(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

GEOFFREY D. RANTZ,

Petitioner,

versus

STATE OF COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

WHERE DEFENSE COUNSEL IS THE SUBJECT OF AN ONGOING CRIMINAL INVESTIGATION INVOLVING KIDNAPPING OF THE DEFENDANT'S SOLE REBUTTAL WITNESS, AND THE TRIAL COURT RESERVES RULING ON COUNSEL'S INVOLVEMENT UNTIL REBUTTAL WITNESS TESTIFIES AND COUNSEL DECIDES NOT TO CALL THAT WITNESS, IS COUNSEL LABORING UNDER A REAL AND SUBSTANTIAL CONFLICT OF INTEREST DURING TRIAL.

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CITATIONS OF THE OFFICIAL REPORTS

The Opinion of the Colorado Court of Appeals issued on April 26, 2006, in an unpublished order: *People v. Geoffrey D. Rantz*, Colorado Court of Appeals No. 02CA2120, April 26, 2002 (unpublished). (App. 1) The Colorado Supreme Court denied Mr. Rantz's request for a writ of certiorari in an unpublished order: *People v. Geoffrey D. Rantz*, Colorado Supreme Court No. 06SC407, Oct. 2, 2006 (App. 24) At issue here is the district court's denial of Mr. Rantz's Motion for post conviction relief. (App. 26)

STATEMENT OF THE BASIS OF JURISDICTION

The Order of the Colorado Supreme Court, denying Mr. Rantz's request for a writ of certiorari to the Colorado Court of Appeals, entered on October 2, 2006. Jurisdiction of this Court is invoked under Title 28, United States Code, Chapter 81, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to . . . assistance of counsel

U.S. Const., amend. XIV:

> . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Title 28, Chapter 81, Section 1257 of the United States Code:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE AND FACTS

Mr. Rantz was convicted of six counts of sexual assault on a child, one count of theft, one count of contributing to the delinquency of a minor, one count of criminal impersonation and one count of practicing psychotherapy without a license. Mr. Rantz was sentenced to a combination of consecutive and concurrent sentences totaling 66 years; the sexual assault convictions are indeterminate sentences with a maximum term of life imprisonment.

Mr. Rantz and Ms. Regulmato met while Mr. Rantz was employed as a behavioral specialist with a public school district in Colorado Springs and Ms. Regulmato was employed in the copy room of a high school in that district. In 1997, Ms. Regulmato and Mr. Rantz agreed that Ms. Regulmato's younger son T.R. should live with Mr. Rantz. T.R. lived with Mr. Rantz until February 2001. During this

time, Ms. Regulmato and her older son A.R. lived with Mr. Rantz on an intermittent basis. According to Mr. Rantz, in February 2001 he became aware that both T.R. and A.R. had been subjected to sexual abuse by their mother. Mr. Rantz reported this to the authorities, including both the police department and social services. The children were interviewed and while A.R. related an incident involving his mother that could be construed as sexual in nature, the authorities nonetheless released the children to the custody of their mother. T.R. refused to return to his mother's custody and instead went to live with his aunt. In March 2001, because his aunt was scheduled to go on vacation, it was decided that T.R. would live with his mother. When T.R. learned of this, he ran away to California. Meanwhile, allegations were being made by A.R. and another individual that Mr. Rantz had been sexually abusing them. This ultimately resulted in the charges involved in this case.

During the pendency of this case, according to T.R., while he was still a runaway, he contacted Mr. Rantz's attorney (hereafter trial counsel) about how to become emancipated. T.R. stated that he was referred to another attorney, C.C. T.R. contacted C.C. and spoke with her about both his mother's abuse of him and his desire to become emancipated. C.C. told T.R. to voluntarily return to Colorado. T.R. refused to do so. The police became aware of the contact between C.C. and T.R., and C.C. informed the police that trial counsel had referred T.R. to her.

In January 2002, a preliminary hearing was held. During that preliminary hearing, the prosecution filed a Motion to Disqualify Defense Counsel, contending that T.R. ran away with the advise of and assistance of Mr. Rantz and that the police had contacted trial counsel and

she denied that Mr. [illegible]tz was harboring T.R. and said that Mr. Rantz did not know where the child was. The motion also alleged that T.R. had contacted trial counsel after she had been contacted by the police and that trial counsel did not report this contact to law enforcement, social services, or T.R.'s mother. Trial counsel filed a response denying any contact with the child. During the preliminary hearing T.R. denied having been in contact with trial counsel. Based upon T.R.'s denial, the motion to disqualify was denied. After trial, however, T.R. submitted an affidavit contending that he was told by trial counsel to deny any contact as it could result in problems for both herself and Mr. Rantz. T.R. also testified at a post-trial hearing that he had been in touch with trial counsel while he was in California.

In April, 2002, a hearing was held on various pretrial matters. At that hearing, the issue of whether defense counsel should be disqualified again came up. Trial counsel again denied having any contact with T.R. while he was in California. The prosecution requested that the matter remain open at least until T.R. testifies. Again trial counsel vehemently denied any contact with the child, placed "[her] entire ethical reputation on the line," and further stated that "this is not a trial about me." The court withheld ruling on the motion until it heard testimony from T.R.

At trial during opening statements, Mr. Rantz's counsel told the jury that they would hear testimony from T.R. which would refute the evidence presented by the People. During the trial, Mr. Rantz called as a witness T.R.'s therapist to whom T.R. said that he had been abused by his mother. Trial counsel indicated to the court that the substance of those allegations would be presented through

T.R.'s testimony. While T.R. was present to testify, Mr. Rantz's counsel decided not to call T.R. as a witness. While counsel contends that it was a matter of "strategy" in deciding not to call T.R., T.R., by way of affidavit and at a later hearing, stated that he was told that he would not be called because trial counsel was concerned that it might come to light that she had contact with T.R. while he was a runaway in California, and that this might get her in trouble. Ultimately T.R. did not testify and Mr. Rantz was convicted.

Mr. Rantz's conviction was appealed and during the appeal, Mr. Rantz's new counsel filed a motion for a limited remand to determine, among other things, whether an actual conflict of interest existed between trial counsel and Mr. Rantz. The motion was granted and the matter was remanded to the trial court. During that hearing, T.R. testified that he was told by trial counsel that she was concerned that it might come to light that she had contact with T.R. while he was in California and that this might result in action against her as she had previously told the court that she did not have any contact with T.R. Trial counsel denied that she had any contact with T.R. while he was in California.[1] According to trial counsel, her decision to not call T.R. was based solely upon strategic considerations.

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[1] C.C., a Denver attorney, testified that trial counsel had contacted her and told her that a witness in one of trial counsel's cases was contacting her about legal advice and she wanted to refer him to C.C. C.C. agreed, and a couple of weeks later T.R. called C.C. about becoming emancipated. T.R. did not like the advice given to him, so there was no more contact between T.R. and C.C.

The district court denied the motion for new trial. In its order the court did not address the issue of whether a conflict existed, but instead focused on whether Mr. Rantz received ineffective assistance of counsel. The matter was recertified to the Colorado Court of Appeals. The Court held that Mr. Rantz failed to show there was an actual conflict of interest because defense counsel had not been charged with any crime during the pendency of the case, and that any potential conflict, if it existed, was so remote as to not warrant the trial court advising Mr. Rantz of the potential conflict. App. 8-9. The court further held that Mr. Rantz also failed to show that counsel took or did not take steps because of any conflict. For this reason the court held that the trial court did not err in failing to advise Mr. Rantz of any conflict and obtain a waiver from him. The Court of Appeals did hold that post-trial and pre-sentencing, an actual conflict did exist as the prosecution was investigating whether counsel was involved in the presentation of perjured testimony; during that investigation certain telephone conversations between the police and counsel were tape recorded without counsel's knowledge, and counsel was concerned that the witness they intended to interview for sentencing would be "wired." App. 9-12. As a result of this investigation, counsel did not interview certain witnesses for the sentencing hearing for fear that the witness may be put under pressure to somehow implicate counsel. App. 12.

The Court of Appeals upheld the convictions but vacated the sentence and remanded for a new sentencing hearing.

REASONS FOR GRANTING THE WRIT

GROUND I: The Colorado Court of Appeals and, through its denial of certiorari, the Colorado Supreme Court, have decided an important federal question in a way that conflicts with relevant decisions of this Court, i.e. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Mickens v. Taylor*, 535 U.S. 162 (2002).

GROUND II: The Colorado Court of Appeals and, through its denial of certiorari, the Colorado Supreme Court, have decided an important federal question in a way that conflicts with the decisions of numerous United States courts of appeals.

Inherent in a criminal defendant's Sixth Amendment right to Counsel is the right to representation that is free of conflict. *Wood v. Georgia,* 450 U.S. 261, 271 (1981); *Holloway v. Arkansas,* 435 U.S. 475 (1978); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Mickens v. Taylor*, 535 U.S. 162 (2002). *See United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995). Effective assistance of counsel "includes a right to conflict-free counsel." *Moss v. United States*, 23 F.3d 445 (6th Cir. 2003). If a trial court becomes aware that a conflict of interest might exist, the trial court is obligated to hold a hearing to determine if in fact an actual or potential conflict exists. If there is a potential conflict, the court is obligated to discuss with the defendant the nature of the conflict and determine if the defendant, after being fully apprised of the conflict is willing to waive that conflict.

The Federal Courts have distinguished between an actual conflict and a potential conflict. According to the Second Circuit Court of Appeals, "[a]n attorney has an actual, as opposed to a potential, conflict of interest when,

during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *United States v. Levy*, 25 F.3d 146, 155 (2nd Cir. 1994) (internal quotation marks and citation omitted). In *Mickens v. Taylor,* this Court interpreted the term "actual conflict of interest" as meaning "a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties." 535 U.S. at 171.

At issue here is whether trial counsel was a) aware that the prosecution was investigating whether she had any contact with T.R. while he was in California and failed to report that contact to the proper authorities; b) whether because of this investigation and because she was concerned that the veracity of statements she made to the court might be questioned, she did or did not take certain steps and thus an actual conflict existed, or, c) whether because of this investigation, a potential conflict existed and thus the trial court was obligated to inform Mr. Rantz of the existence of the potential conflict and secure a waiver of that conflict before trial counsel could continue to represent him. The Colorado Court of Appeals held that an actual conflict exists when an attorney represents conflicting interests or is facing criminal charges in the same district where the defendant is charged. The Court failed to recognize that the fact that an attorney is under investigation by the same district attorney's office that is prosecuting the case can also give rise to an actual conflict.

The Second Circuit Court of Appeals in *United States v. Locasio*, 6 F.3d 924, 931 (2nd Cir. 1994) recognized that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to

all who observe them." A conflict can arise not only when an attorney's representation is affected by his or her loyalty to a current or former client, it also arises when the interests of the defendant and the attorney "diverge with respect to a material factual or legal issue or to a course of action." *United States v. Jones,* 381 F.3d 114, 119 (2nd Cir. 2004). Several circuits have held that an actual conflict can arise not only if a defendant's attorney is actually charged with a crime, but also if the attorney is under investigation for a crime. *United States v. Baker*, 256 F.3d 855, 859 (9th Cir. 2001) (Actual conflict exists if there is "a conflict between a client and his lawyer's personal interest."); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987) (actual conflict exists where attorney was being investigated by the same United States Attorney's office prosecuting the defendant), overruled on other grounds as recognized by *United States v. Watson*, 866 F.2d 381, 385 n. 3 (11th Cir. 1989); *United States v. Levy*, 25 F.3d 146, 155 (2nd Cir. 1994) (actual conflict exists when attorney is being prosecuted on unrelated charges by same office prosecuting defendant); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (actual conflict may exist if defendant's lawyer is under criminal investigation by the same prosecutor's office).

According to the Colorado Court of Appeals, because the nature of the conflict was brought to the attention of the court through a motion to disqualify counsel, an abuse of discretion standard applied. It is questionable whether the abuse of discretion standard of review employed by the Court of Appeals is the proper standard of review. More than one Circuit Court of Appeals has held that an appellate court should employ a stricter standard of review. In

United States v. Snyder, 707 F.2d 139 (5th Cir. 1983), the Court held that:

> We believe that this conflict was correctly resolved by the Eleventh Circuit in *United States v. Hobson*, 672 F.2d 825 (11th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982), where the court stated: "We believe that in criminal cases, where the defendant's sixth amendment right to counsel is implicated, the conflict in our prior cases should be resolved in favor of the accused. The abuse of discretion standard is simply too deferential where such a fundamental constitutional right is affected." Id. at 827.

Snyder, 707 F.2d at 144. The Fifth Circuit therefore adopted a "simple error" standard of review. In *United States v. Bolden*, 353 F.3d 870 (10th Cir. 2003), the Tenth Circuit held that a "bifurcated standard of review" applies when reviewing attorney disqualification orders:

> First, we review the district court's factual conclusions under a clear error standard. *United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990). Second, we review the district court's legal interpretation of particular ethical norms under a de novo standard when that interpretation implicates important constitutional rights. *Id.* (applying de novo review when disqualification implicates the Sixth Amendment right to counsel). De novo review is especially appropriate "in disqualification cases . . . where the facts are not in dispute, [because] district courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms." Id. (internal citations omitted). Thus, because the current disqualification order

> implicates important constitutional principles and the district court did not base its order on highly disputed facts, we review the order under the de novo standard of review. See id.

Bolden, 353 F.3d at 878. The Colorado Court of Appeals' application of an abuse of discretion standard of review is in conflict with the standard of review applied in three United States Circuit Courts of Appeals. The standard of review employed is determinative of the degree of protection the Court gives a criminal defendant's Sixth Amendment right to conflict free counsel, and thus ultimately a defendant's right to effective representation of counsel. This Court, in both determining whether to grant certiorari and in resolving this matter, if in fact certiorari is granted, should apply the correct standard of review.

The fact that the conflict came to the court's attention through the People's motion is immaterial. Based upon the facts presented to the trial court at the time of the motion, there was no basis for the disqualification motion, and there was no reason for Mr. Rantz to believe that a conflict existed. The claim is not that the court, based upon the information before it pre-trial, failed to grant the People's motion to disqualify counsel but whether, with the information that came to light post-trial, counsel had a conflict, either actual or potential. The Colorado Court of Appeals held that the trial court was not obligated to disqualify counsel unless failure to do so impacted "the integrity of the fact finding process, the fairness or appearance of fairness at trial, the orderly or efficient administration of justice, or public trust and confidence in the criminal justice system." App. pp. 7-8. Rather than balancing two competing Sixth Amendment rights of the defendant and exercising its supervisory power in resolving that conflict,

the Court should have reviewed the matter to determine whether, based upon the facts and evidence presented during the pretrial proceedings and the remand hearing, trial counsel was operating under either an actual conflict of interest or a potential conflict of interest of which Mr. Rantz was not aware and whether, as a result, Mr. Rantz's Sixth amendment right to counsel was violated. *See Bonin v. California*, 494 U.S. 1039, 1044 (1990). ("The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial.") *See Wood v. Georgia*, 450 U.S. 261, 271 (1981) (right to counsel encompasses the "right to representation that is free from conflict of interest.").

This case must be contrasted with *Wheat v. United States*, 486 U.S. 153, 163-64 (1988) where the issue was whether the trial court incorrectly refused to accept the defendant's waiver of the conflict that existed between the defendant and counsel, and with *United States v. Gonzalez-Lopez*, ___ U.S. ___ 126 S.Ct. 2557, 2565-66 (2006) where the trial court unreasonably interfered with the defendant's choice of counsel.

The trial court found that because trial counsel provided reasons why she did not call T.R., and because it believed trial counsel's statement that she did not have contact with T.R. while he was in California, that there was not a conflict. What this ignores is that T.R. testified that there was such contact, and the testimony of C.C. (see FN1) can be seen as corroborating T.R.'s testimony. C.C.'s testimony that trial counsel told her that she was being contacted by a witness for legal advice, trial counsel's request to refer the individual to C.C., and T.R.'s subsequent

contact with C.C. lends credence to T.R.'s version of events. At the very least it is sufficient to justify an investigation.

The Court of Appeals then compounded the problem when it first analyzed the issue as whether the trial court correctly denied the motion to disqualify based upon the evidence the trial court had pre-trial, and then simply concluded that, because trial counsel had not been charged with a crime during the pendency of the case, there was not an actual conflict. As this Court, as well as numerous other federal courts have recognized, an actual conflict can exist even if counsel is not charged with a crime. Instead, the standard is whether the attorney's interest and the client's interest diverge. That is why the fact that the attorney is under criminal investigation is sufficient. *See Jones*, *supra*; *Baker*, *supra*; *McLain*, *supra*; *Thompkins v. Cohen*, *supra*, all recognizing that the fact that the attorney is under criminal investigation is sufficient – there is no need that actual criminal charges be pending. As the United States District Court for the Eastern District of Michigan stated:

> [W]hen an attorney is the subject of a criminal investigation by the same prosecutor who is prosecuting the attorney's client, there is a high probability of prejudice to the client as the result of the attorney's obvious self serving bias in protecting his own liberty interests and financial interests.

Rugiero v. United States, 330 F. Supp. 2d 900, 906 (E.D. Mich. 2004). The prosecution, by the filing of the motion to disqualify, put counsel on notice that they were looking into the nature of any contact that might have occurred between T.R. and trial counsel. The issue is not necessarily

whether the contacts occurred or the nature of the contacts but whether an investigation was occurring. "It is the existence of this undeniable uncertainty . . . before and during Petitioner's trial and [counsel's] knowledge of this uncertainty that gives rise to the actual conflict in this case." *Rugiero*, 330 F. Supp. 2d at 907, *citing Taylor*, *supra*; *Levy, supra*; *Thompkins v. Cohen*, *supra*; *McLain, supra*.

Once counsel became aware that these allegations had been made and that the prosecutor took them seriously enough to file a motion to disqualify, counsel was put in a position of worrying what T.R. might say. If at trial T.R. stated that he had been in touch with counsel, this increased the risk that the investigation would be pursued. Furthermore, because trial counsel had denied to the court that there had been contact with T.R., there was the potential that trial counsel's candor to the court could come into question thus prompting a potential investigation by Attorney Regulation Counsel. The issue is not whether the court was more likely to believe T.R. or believe counsel, but rather whether T.R. could testify in such a manner as to implicate counsel in any wrongdoing. In other words, it is the mere making of the statement that could present problems for counsel, and thus it was in counsel's best interest that T.R. not testify. Thus an actual conflict existed of which Mr. Rantz was not aware, and therefore did not waive. Moreover, even if the conflict can be viewed only as a potential conflict, Mr. Rantz was still unaware and still did not waive that potential conflict.

Like any other waiver of constitutional rights, that waiver must be knowing and voluntary. *See Johnson v. Zerbst,* 304 U.S. 458, 464 (1938) ("courts indulge every reasonable presumption against waiver of fundamental

constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.") (footnotes omitted). Mr. Rantz could not have waived the right to conflict free counsel unless he knew that counsel was laboring under either an actual or potential conflict. *See United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998) ("Trial courts may allow an attorney to proceed despite a conflict if the defendant makes a voluntary, knowing, and intelligent waiver.") (internal quotations omitted); *United States v. Flores*, 5 F.3d 1070, 1078 (7th Cir. 1993) ("district court [must] inform each defendant of the nature and importance of the right to conflict-free counsel and ensure that the defendant understands something of the consequences of a conflict."); *United States v. Rodriguez,* 982 F.2d 474, 477 (11th Cir. 1993) (A defendant's waiver must be established by clear, unequivocal, and unambiguous language. The record should show, in some way, that the defendant was aware of the conflict of interest; realized the conflict could affect the defense; and knew of the right to obtain other counsel) (internal quotation marks and citations omitted); *Gray v. Estelle*, 616 F.2d 801, 804 (5th Cir. 1980) ("district court should obtain a response from each defendant indicating that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections."); *United States v. Gallegos*, 108 F.3d 1272, 1281 (10th Cir. 1997) ("waiver of a constitutional right must not only be voluntary, but must be a knowing, intelligent act done with sufficient awareness of the

relevant circumstances and likely consequences.") (internal quotations omitted). *Brady v. United States*, 397 U.S. 742, 748 (1970). In determining whether a defendant has waived his right to conflict-free representation, a court must "indulge every reasonable presumption against the waiver." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Furthermore, a court is not obligated to accept a waiver. *Wheat v. United States*, 486 U.S. 153 (1988). Because there was a conflict and there was not a valid waiver, the Court of Appeals' Opinion is incorrect and conflicts with relevant decisions of this Court and with those of numerous Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner Geoffrey D. Rantz respectfully requests that this petition for a Writ of Certiorari be granted. Further, Petitioner requests that this Court vacate the order of the Colorado Supreme Court and Court of Appeals, and remand this case for further proceedings.

Respectfully submitted,

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COLORADO COURT OF APPEALS

Court of Appeals No.: 02CA2120
El Paso County District Court No. 01CR4048
Honorable Theresa M. Cisneros, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Received 4-20-06

Geoffrey Del Rantz,

Defendant-Appellant.

JUDGMENT AND ORDER AFFIRMED,
SENTENCE VACATED, AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by: JUDGE VOGT
Casebolt and Furman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: April 20, 2006

John W. Suthers, Attorney General, Laurie A. Booras, First Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Allen C. Gasper, Attorney P.C., Allen C. Gasper, Colorado Springs, Colorado, for Defendant-Appellant

Defendant, Geoffrey Del Rantz, appeals the judgment of conviction entered, and the sentence imposed, following a jury verdict finding him guilty of sexual assault on a child, sexual assault on a child by one in a position of

trust, sexual assault on a child as part of a pattern of abuse, sexual assault on a child by one in a position of trust as part of a pattern of abuse, contributing to the delinquency of a minor, theft, criminal impersonation, and practicing psychotherapy without a license. He also appeals the trial court's order, entered on limited remand from this court, denying his motions for postconviction relief and a new trial. We affirm the judgment and the order, vacate the sentence, and remand for resentencing.

According to the prosecution's evidence at trial, defendant sexually assaulted two youths, A.R. and G.S., after having persuaded their families that he was qualified to provide counseling to the youths. Following the jury's guilty verdict, the trial court imposed concurrent and consecutive prison sentences, some of which were indeterminate sex offender sentences with a range of twenty years to a maximum of defendant's natural life.

During the pendency of defendant's direct appeal, the case was remanded for consideration of defendant's Crim. P. 35(c) and new trial motions. After hearing evidence and argument, the trial court entered an order denying relief, finding no ineffective assistance of counsel, no prosecutorial misconduct, and no right to a new trial based on newly discovered evidence.

I.

Defendant first contends the trial judge erred in refusing to recuse herself because she was "a victim of and witness to" one of the offenses of which he was charged. We disagree.

A judge is disqualified to hear or try a case if, as relevant here, "[t]he offense charged is alleged to have been committed against the person or property of the judge," or if the judge "is in any way interested or prejudiced with respect to the case, the parties, or counsel." Section 16-6-201(1)(b), (d), C.R.S. 2005.

If a verified motion for disqualification is filed with appropriate supporting affidavits, and the motion and affidavits state facts showing grounds for disqualification, the judge must enter an order disqualifying himself or herself Section 16-6-201(3), C.R.S. 2005.

In ruling on a disqualification motion, a judge must accept as true the factual statements contained in the motion and affidavits. The judge must then determine, as a matter of law, whether the facts alleged are legally sufficient for disqualification. *People v. Julien,* 47 P.3d 1194 (Colo. 2002).

The test of the legal sufficiency of a motion to disqualify a judge on the grounds of interest or prejudice is whether the motion and affidavits state facts from which it may reasonably be inferred that the judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with the moving party. Unless a reasonable person could infer that the judge would likely be prejudiced against the moving party, the judge's duty is to sit on the case. Further, information that a judge learns while acting in his or her judicial capacity will generally not constitute grounds for disqualification. *People v. Ramos,* 708 P.2d 1347 (Colo. 1985).

We review de novo the trial court's ruling on a disqualification motion. *People v. Julien, supra.*

Here, defendant was charged with having criminally impersonated a licensed clinical social worker. In his pretrial "motion for substitution of judge," defendant alleged that the trial court had been the presiding judge in a termination proceeding in which he had provided testimony "on which the Court appeared to rely in granting a termination of parental rights." Therefore, he alleged, the court could reasonably be assumed to have been the "victim" of the criminal impersonation charge and, additionally, "might be prejudiced in light of the charges filed against him." Attached to the motion were affidavits from defendant's trial counsel and minute orders reflecting that defendant was present at hearings at which the trial judge had presided.

At a hearing on the recusal motion, defense counsel conceded that the minute orders did not show that defendant had in fact ever testified as a therapist in those hearings, and the prosecutor observed that defendant had appeared in all the courtrooms in the jurisdiction while he was employed by the county department of human services.

The trial court concluded that the motion was facially insufficient to warrant recusal because there was no indication that defendant had actually testified in any proceedings before her. However, she invited counsel to renew the motion if they determined that transcripts of the proceedings showed there was a basis for disqualification. Defendant did not renew his motion.

We agree with the trial court that, even if we accept the truth of the factual statements contained in the motion and affidavits, the motion was legally insufficient to require disqualification.

The motion was premised on information that the trial court was alleged to have learned in the course of performing her judicial duties. *See People v. Ramos, supra.* The situation presented here is thus entirely unlike that in *Hammons v. Birket,* 759 P.2d 783 (Colo. App. 1988), on which defendant relies, where refusal was required based on the appearance of bias or prejudice because the judge had had a professional relationship, through his part-time law practice, with defendant's expert.

Moreover, even assuming that the judge could become a victim of or witness to defendant's offense while acting in her judicial capacity, the motion and supporting materials did not set forth sufficient facts to establish that conclusory allegation. *See S.S. v. Wakefield,* 764 P.2d 70 (Colo. 1988) (motion and affidavits that merely allege opinions or conclusions are not legally sufficient to require disqualification). Finally, we are not persuaded that the trial court's observation at the sentencing hearing that defendant had "perpetrated a fraud" on the court requires us to conclude that its initial refusal to recuse was erroneous.

II.

In related contentions, defendant asserts that he was denied his right to be represented by conflict-free counsel at trial and at sentencing. Specifically, he argues that the trial court erroneously failed to advise him of the potential conflict prior to trial; that his counsel operated under an actual conflict of interest that adversely affected their performance at trial; and that counsel similarly had an actual conflict of interest that adversely affected their performance at sentencing. We disagree with the first two contentions, but agree with the third.

A.

The right to effective assistance of counsel in a criminal prosecution includes the right to conflict-free representation. *People v. Martinez,* 869 P.2d 519 (Colo. 1994).

A conflict of interest exists if a lawyer's representation of a client may be materially limited by the lawyer's own interests. Colo. RPC 1.7(b). One circumstance presenting such a conflict is when defense counsel has been charged with a crime and is susceptible to prosecution, during the pendency of the representation of his or her client, by those responsible for the client's prosecution. *People v. Edebohls,* 944 P.2d 552 (Colo. App. 1996). A conflict of interest may also arise where counsel is likely to be a witness at trial. *See* Colo. RPC 3.7.

Conflicts are categorized as either actual – that is, "real and substantial" – or potential – that is, "possible," "nascent," or one that "in all probability will arise." Both actual and potential conflicts may or may not be waivable. Determinations regarding the potentiality of the conflict and its waivability are necessarily fact-specific and must be made on a case-by-case basis. *People v. Harlan,* 54 P.3d 871, 878-79 (Colo. 2002).

Once a potential conflict of interest becomes reasonably apparent, the trial court must ensure that the defendant has been adequately advised of the nature of the conflict and of the risks associated with waiving conflict-free representation. *People v. Edebohls, supra.* However, in cases where the potential conflict is remote, "waiver may not be required at all." *People v. Harlan, supra,* 54 P.3d at 880.

To establish an actual conflict of interest, a defendant bears the burden of demonstrating that counsel actively represented conflicting interests, and that that actual conflict of interest adversely affected counsel's performance. The defendant must point to specific instances in the record to suggest actual impairment of his or her interest; must identify something that counsel chose to do or not do, as to which counsel had conflicting duties; and must show that the course taken was influenced by the conflict. If the defendant meets this burden, the requisite degree of prejudice is established, and the defendant does not have to demonstrate that the result of the trial or other proceeding would have been different without the conflict. *People v. Kenny,* 30 P.3d 734 (Colo. App. 2000).

B.

Although defense counsel raised their asserted conflict of interest in post-trial motions, the conflict was brought to the trial court's attention before the conclusion of trial on only one occasion – namely, when the prosecution filed a pretrial motion to disqualify defense counsel pursuant to Colo. RPC 3.7 and 1.7. Thus, in addressing the conflict issue at this stage in the proceedings, the trial court was also required to consider the standards applicable to motions for disqualification of defense counsel.

Disqualification may be necessary based on the presence of a real and substantial conflict that places defense counsel in a situation inherently conducive to and productive of divided loyalties. However, disqualification is a severe remedy that should be avoided if possible. It is proper only when it appears reasonably necessary to ensure the integrity of the fact-finding process, the fairness or

appearance of farness at trial, the orderly or efficient administration of justice, or public trust and confidence in the criminal justice system. *People v. Harlan, supra.*

A trial court's order regarding disqualification is reviewed under an abuse of discretion standard. *People v. Harlan, supra.*

At the time the prosecution's motion was filed, defendant was facing a kidnapping charge, later dismissed, based on his allegedly having concealed T.R., the brother of the sexual assault victim A.R., from the brothers' mother, who had custody of them. The prosecution alleged that defense counsel had had communications with T.R. regarding his runaway status and had referred T.R. to another attorney for advice regarding proceedings to emancipate himself from his mother. Thus, the prosecutor alleged, defense counsel would be a material witness for the People in regard to the kidnapping charge and in regard to T.R.'s credibility.

Defense counsel opposed the motion as "meritless and groundless," stating that they had never spoken with T.R. prior to the preliminary hearing and that the motion was a device for forcing them to terminate their representation of their client.

At a hearing on the motion, a detective testified that T.R. had told him he had never spoken directly with defense counsel. The trial court denied the motion, finding that the prosecution was merely speculating about whether or not defense counsel had ever had any contact with T.R.

On this record, we conclude it was not an abuse of discretion for the trial court to deny the prosecution's

disqualification motion, and that any "potential" conflict was so remote, if not nonexistent, that the trial court did not err in failing to advise defendant of it. *See People v. Harlan, supra.*

Nor has defendant established that counsel labored under an actual conflict up to and through the time of trial. Defense counsel were not, during this time period, charged with any crime for which they were susceptible to prosecution by the district attorney's office. *Cf. People v. Edebohls, supra* (actual conflict existed where defense counsel was charged before trial with witness tampering and bribery in unrelated case, and district attorney's office was responsible for prosecutions of both defendant and defense counsel).

Additionally, defendant has not shown that any conflict adversely affected counsel's performance at trial. He argues that counsel's failure to call T.R. as a witness was attributable to counsel's conflict of interest. However, as set forth below, the trial court concluded, with record support, that the decision not to call T.R. was a valid strategic decision.

Thus, defendant is not entitled to reversal of his conviction based on counsel's asserted conflict of interest at trial or based on the trial court's failure to advise of [sic] him of a potential conflict.

C.

We reach a different conclusion regarding counsel's representation of defendant at his sentencing hearing.

Shortly after trial, defense counsel filed an emergency motion to withdraw, stating that certain events had

occurred that had created an antagonistic relationship between them and defendant. At a hearing on the motion, defense counsel indicated that defendant did not want them to withdraw. They also stated that they had asked the prosecutor whether the prosecutor knew of any reason why they should withdraw, but the prosecutor was unwilling to tell them. The prosecutor indicated that certain police reports, which defense counsel had not seen, concerned allegations of witness tampering by defense counsel, and that these allegations related to a witness other than T.R. The court observed that an allegation that defense counsel were potential witnesses in regard to the new witness tampering allegations was "a conflict." It ordered the prosecutor to provide defense counsel with the police reports and to decide whether, in the prosecution's view, it was appropriate to disqualify defense counsel.

The prosecutor did not move to disqualify defense counsel. However, shortly before the sentencing hearing, defense counsel filed a renewed emergency motion to withdraw based on the discovery materials received from the prosecution. A hearing was held, at which defense counsel were represented by their own conflicts counsel. Conflicts counsel advised the court that defense counsel were now in a position where their personal interests – namely, protecting themselves in regard to the district attorney's investigation – conflicted with their ability to represent defendant effectively at the sentencing hearing. Discovery materials revealed that defense counsel were being investigated for subornation of perjury, and defense counsel had learned that a conversation they had had regarding the investigation had been surreptitiously tape-recorded. The prosecutor confirmed that the conversation had been tape-recorded.

Based on the tape-recording incident, defense counsel A.K. was concerned that other witnesses whom she needed to interview before sentencing might be wired when she talked to them, and that phone conversations might be taped.

Defendant told the court he agreed that his counsel had to withdraw. He believed that nothing had been done to prepare for sentencing, and stated that counsel had not prepared him to make his own statement at sentencing.

At the conclusion of the hearing, the trial court acknowledged that defense counsel were in a difficult position, but concluded that that was insufficient to allow them to withdraw or to continue the sentencing hearing.

At the hearing on remand from this court, when the prosecutor asked defense counsel why she chose not to call a certain witness at the sentencing hearing, she responded that she had not interviewed the witness because she believed that the prosecutor's office "would follow behind me and would have found out that we did because, you know, you were keeping pretty close track of what we were doing." She was also concerned that the witness could be put under pressure by the prosecution to implicate her.

On this record, we conclude that the renewed investigation by the district attorney's office following the trial placed defense counsel in a situation where their ability to represent defendant at sentencing was materially limited by their own concerns and interests. Thus, by this point, an actual conflict of interest had arisen. Further, the evidence shows that the conflict adversely affected counsel's performance at sentencing. The court was advised before sentencing that counsel were reluctant to interview potential witnesses; defendant told the court that his

attorneys' own interests were interfering with their preparation for his sentencing; and defense counsel herself, at the remand hearing, identified a specific witness that she had decided not to interview or call because of the prosecutor's pending investigation of defense counsel. As set forth below, we have concluded that the testimony of that witness would not likely have brought about an acquittal at trial; however, counsel's failure to interview him or call him at the sentencing hearing is nevertheless relevant to determining whether counsel's performance at sentencing was adversely affected by an actual conflict of interest. *See People v. Kenny, supra.*

In these circumstances, defendant has met his burden of demonstrating that his counsel had an actual conflict of interest that adversely affected their performance at the sentencing hearing. Thus, we conclude that the sentence imposed at that hearing must be vacated and the case remanded for a new sentencing hearing, at which defendant is to be represented by conflict-free counsel. *See People v. Kenny, supra.*

III.

Defendant next contends that, regardless of whether there was a conflict at trial, he received ineffective assistance of counsel because his counsel did not call T.R. to testify after having told the jury in opening statement that they would do so. We disagree.

To obtain relief on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient – that is, that it fell below an objective standard of reasonableness as informed by prevailing professional standards – and that counsel's deficient

performance prejudiced the defense. *Davis v. People,* 871 P.2d 769 (Colo. 1994); *see Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A defendant seeking to establish deficient performance must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strategic or tactical choices made after thorough investigation of the law and the facts are virtually unchallengeable. *Davis v. People, supra.*

Whether to call a particular witness is a tactical decision and, thus, a matter of discretion for trial counsel. *Davis v. People, supra*; *People v. Bradley,* 25 P.3d 1271 (Colo. App. 2001).

In reviewing a trial court's order entered following a hearing on a Crim. P. 35(c) motion alleging ineffective assistance of counsel, we are mindful that it is the trial court's role to assess the credibility of witnesses and the weight to be given to the evidence. *People v. Schneider,* 25 P.3d 755 (Colo. 2001).

At the hearing on defendant's postconviction motion, his counsel explained the reasons why she decided not to call T.R. as a witness even though the jury had been told in opening statement that he would be called. First, she and her co-counsel believed that they had "sort of beat" the sexual assault-related charges – to which T.R.'s testimony would have been relevant – through cross-examination of A.R. and G.S. Second, she had reviewed T.R.'s videotaped statement shortly before he was to be called as a witness, and had concluded that that statement would have "killed" defendant on the count related to G.S. Finally, although counsel had successfully obtained dismissal of the state kidnapping charge at mid-trial, they concluded that if T.R.

had taken the stand, he would either have perjured himself or told the truth about "how he got to California," thereby subjecting defendant to federal criminal prosecution for taking a child across state lines.

The trial court found defense counsel's testimony "credible and supported by other witnesses." It found the testimony of T.R., who testified that he had had contact with defense counsel when he was in California, not credible. The court additionally found that both defense counsel were very well prepared and thorough in representing defendant, and that they were in the best position to determine whether T.R.'s testimony would have been more of a liability than an asset. It concluded that, because the decision not to call T.R. was a strategic decision, defendant had failed to show that his counsel's performance was constitutionally deficient.

We find no error in the trial court's ruling. Although defendant challenges the plausibility of some of the explanations by defense counsel that the trial court found credible, his arguments do not persuade us that we may interfere with that court's credibility determination. *See People v. Schneider, supra.* Further, the failure to produce a promised witness is not ineffective assistance of counsel where it is based on an informed decision to change strategy in the midst of trial. *Turner v. Williams,* 35 F.3d 872 (4th Cir. 1994), *overruled on other grounds by O'Dell v. Netherland,* 95 F.3d 1214 (4th Cir. 1996), *aff'd,* 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

IV.

Nor are we persuaded by defendant's related contention that counsel's decision not to call T.R. as a witness rendered his waiver of the right to testify involuntary.

At trial, defendant waived his right to testify after receiving a complete advisement in accordance with *People v. Curtis,* 681 P.2d 504 (Colo. 1984). It was undisputed that both trial counsel had advised defendant not to testify before the *Curtis* advisement was given. However, in his postconviction motion, defendant asserted that he had waived his right to testify before counsel told him they would not call T.R. as a witness, and that his waiver was therefore not knowing, intelligent, or voluntary.

At the hearing on defendant's postconviction motion, one of defendant's trial attorneys testified that he did not remember whether he had informed defendant before or after the *Curtis* advisement that T.R. would not testify, but he remembered that defendant was "very upset" when he learned of the decision. Defendant's other trial attorney testified that she could not remember whether defendant had changed his mind about wanting to testify after he learned that T.R. would not be called, and that, if he had insisted on testifying, she would have encouraged him not to do so. However, she recognized that "ultimately if a client says they're going to testify, they're going to testify," and she stated that she would "absolutely" have raised the issue with the court, even after the *Curtis* advisement, if defendant had changed his mind about testifying.

The trial court was entitled to credit defense counsel's testimony on this issue. In light of that testimony, the court could properly conclude that defendant had failed to establish that he would have testified, notwithstanding his

previous valid waiver of that right, had he known T.R. would not testify.

V.

Defendant next contends that the prosecution's untimely disclosure of its investigation of the mother of T.R. and A.R. violated its obligations, under Crim. P. 16 and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to disclose material exculpatory evidence, and that this violation deprived him of his right to present an alternative suspect defense. He also contends that the untimely disclosure by the prosecution rendered his counsel ineffective because they were unable to prepare adequately for cross-examination of the mother. We do not agree.

The prosecution is obligated to disclose to the defense any material or information in its possession or control that tends to negate the guilt of the accused as to the offense charged or that would tend to reduce the punishment for the offense. Crim. P. 16(1)(a)(II); *see Brady v. Maryland, supra.* The disclosure obligation under *Brady* extends to evidence that the defense might have used to impeach the prosecution's witnesses by showing bias or interest. *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The *Brady* rule is based on the requirement of due process. *United States v. Bagley, supra.* However, failure to disclose information falling within the *Brady* rule results in a violation of due process only where the evidence is material either to guilt or to punishment. More specifically, there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. *Salazar v. People,* 870 P.2d 1215 (Colo. 1994).

Allegations of sexual misconduct by the mother of T.R. and A.R. had been raised by defendant but had initially been denied by the sons. The trial court had subsequently granted a two-week continuance of the trial, at the request of the defense, when it was learned that T.R. had made a statement that his mother had sexually abused him.

At the time of the trial, the police were investigating the allegations of sexual abuse by the mother, but defense counsel did not receive a police report concerning the investigation or a copy of a videotaped interview until the trial was already under way.

When the issue was raised at trial, the court found that the prosecution had done nothing to impede defense counsel's access to any information about the investigation of the mother; that the defense had much of the information before the trial started and was given information about the interview with T.R. shortly after the interview took place; that the defense was not entitled to "know every chapter and verse" of what the prosecution was doing in regard to the investigation; that the defense had very thoroughly cross-examined the mother; and that there was no basis for any sanction for untimely disclosure. As discussed below, the court also prescribed procedures that would permit the defense to apprise the jury of the allegations regarding the mother.

The trial court's observations regarding the timing of the events, and the knowledge possessed by each side in the case, are amply supported by the record. More important, even if the prosecution could have disclosed information about the investigation sooner, defendant has not

shown that its failure to do so deprived him of any constitutional rights.

Specifically, the allegations of misconduct on the part of the mother were known to the defense before trial. Defense counsel vigorously cross-examined her and brought out evidence of the allegations through other witnesses – namely, T.R.'s therapist, a detective, and a civilian investigator for the police department. Defendant does not indicate how counsel's cross-examination of the mother might have been substantially more effective had counsel known the details of the police investigation at the time of the cross-examination, and he has not shown that earlier disclosure of the information might have led to a different result. Thus, he is not entitled to relief based on the grounds of an asserted *Brady* violation, *see Salazar v. People, supra,* or on the basis of ineffective assistance of counsel, *see Davis v. People, supra.*

Moreover, the allegations concerning the mother related to her nudity in the presence of her sons. No witness suggested that the mother committed the sexual assaults with which defendant was charged. Because the mother was being investigated for offenses other than the offenses with which defendant was charged, she was not an alternative suspect as to those offenses, and defendant was not deprived of the right to present the defense of alternative suspect.

VI.

We similarly reject defendant's contention that, when the prosecution called the mother of A.R. and T.R. to testify, it was presenting "knowingly questionable testimony."

Defendant does not allege, and the record does not reflect, that the prosecutor knew the mother would commit perjury or that the mother in fact gave perjured testimony. Rather, defendant claims simply that the prosecution knew that the mother had a motive to testify falsely because she was being investigated for the "same crimes" for which defendant was being prosecuted.

However, as noted above, the mother was not in fact being investigated for the same crimes as those with which defendant was charged. Moreover, before she testified, the mother confirmed to the court that she had not been promised immunity from prosecution in exchange for her testimony.

Although the prosecutor might have been aware, as was defense counsel, that the pending investigation of the mother could give her a motive to testify falsely, we are aware of no authority that precluded the prosecutor from calling her as a witness for that reason. Such testimony may be admitted at trial as long as it is subjected to cross-examination, as it was here. *See Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

On cross-examination, defense counsel elicited admissions from the mother that she had committed perjury in custody and probate proceedings, that she had deceived the grandparents of G.S., and that she had lied in the past to benefit her children. Thus, the jury was given ample grounds for questioning the truthfulness of her testimony.

VII.

In light of the analysis set forth above, we reject defendant's related contention that the trial court abused

its discretion by not ordering a mistrial or imposing other severe sanctions for the prosecution's asserted discovery violations.

The trial court has broad discretion in fashioning remedies for the prosecution's failure to disclose exculpatory evidence. However, the sanctions must be no more restrictive than necessary to protect the defendant's right to due process. *People v. District Court,* 808 P.2d 831 (Colo. 1991).

A trial court likewise has broad discretion in determining whether to grant or deny a mistrial, and its decision will not be disturbed on appeal absent a gross abuse of discretion and prejudice to the defendant. However, a mistrial is the most drastic of remedies, and is warranted only where the prejudice to the accused is too substantial to be remedied by other means. *People v. Collins,* 730 P.2d 293 (Colo. 1986).

Under the facts presented here, we perceive no abuse of discretion in the trial court's refusal to grant a mistrial or order other drastic sanctions for the prosecution's alleged discovery violations.

Some five months before trial, defendant moved for sanctions, including dismissal of the charges or striking A.R. as a victim, based on the prosecution's failure to disclose certain interviews of which the defense had learned when it reviewed a videotape produced by the district attorney. The trial court ordered counsel to meet and review discovery to determine what had been produced, and it ordered the prosecutor to provide defense counsel any undisclosed materials within twenty-four hours of the time the prosecutor received them.

Given the breadth of the trial court's discretion regarding sanctions and the length of time remaining until trial, we perceive no abuse of discretion here. Further, defendant has not stated how he was prejudiced by the asserted untimely disclosure. *See Salazar v. People, supra.*

In a second motion, filed near the conclusion of trial, defense counsel again raised numerous discovery violations, primarily related to information about the mother's asserted sexual abuse of her sons. Counsel requested dismissal of certain counts or, alternatively, a mistrial, a continuance, or – as a "last resort" – leave to use hearsay statements, without cross-examination by the prosecution.

Following a lengthy hearing, the trial court made detailed findings. The court found, as discussed above, that the prosecutor had not "knowingly, intentionally, or purposely withheld any information," and that there was no reason to impose sanctions. Nevertheless, it determined that defendant should be able to bring certain of the allegations regarding the mother to the attention of the jury. Thus, it ordered that the defense could play a videotaped interview for the jury, could introduce hearsay statements of the boys' father through a police detective, and could argue corroboration to the jury.

Again, we conclude the court did not abuse its discretion in refusing to order the drastic sanctions requested by defendant, while at the same time ensuring that defendant would be able to bring to the jury's attention information that had only recently come to light.

Finally, we reject defendant's contention that he is entitled to relief based on the trial court's statement that a discussion about immunity for the mother was not "*Brady* material." Even if the discussion to which the court

referred could be considered relevant to impeachment of a prosecution witness and therefore "*Brady* material," *see United States v. Bagley, supra,* defendant has not demonstrated how he was prejudiced by the statement, which was made in the context of the court's denial of a motion to disqualify the prosecutors.

VIII.

Defendant contends the trial court abused its discretion in denying his new trial motion based on newly discovered evidence. Again, we do not agree.

Motions for a new trial based on newly discovered evidence are looked upon with disfavor. The trial court's denial of such a motion will not be overturned absent clear abuse of discretion. *People v. Lowe,* 969 P.2d 746 (Colo. App. 1998).

To succeed on a motion for a new trial on the ground of newly discovered evidence, a defendant must show, as relevant here, that the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching, and that it would probably produce an acquittal on retrial. *People v. Lowe, supra.*

In his new trial motion in this case, defendant asserted that a newly discovered witness, J.A., would testify that the mother of A.R. and T.R. had had sexual intercourse with him while he was a teenager; that she had conspired to accuse defendant falsely; that she had offered money for his false testimony as part of that conspiracy; and that she had previously falsely accused her former husband of the same offenses. This testimony, it was alleged, would have "created a significant fact issue for the

jury to determine," and "would have destroyed the credibility of the state's primary witness."

After hearing J.A.'s testimony at the hearing on remand, the trial court concluded that J.A. had "credibility problems" because of his close relationship with defendant, his criminal history, and his mental health problems. The court also noted that J.A.'s testimony was "remarkably similar" to that of another trial witness, who had testified regarding the mother's behavior with him and that the mother had offered him money to "help set someone up." Under the circumstances, the court concluded, J.A.'s testimony, if believed, would be "cumulative or impeachment and . . . not likely to bring about the acquittal of the defendant."

The trial court considered the newly discovered evidence under the appropriate legal standard, and the record supports its determination that the proffered evidence was cumulative or impeaching and, especially in light of J.A.'s credibility problems, unlikely to result in an acquittal. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

The judgment of conviction and the order denying postconviction relief are affirmed. The sentence is vacated, and the case is remanded for a new sentencing proceeding, at which defendant shall be represented by conflict-free counsel.

JUDGE CASEBOLT and JUDGE FURMAN concur.

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE COURT OF APPEALS, 02CA2120 DISTRICT COURT, EL PASO COUNTY, 01CR4048	CASE NO. 06SC407
Petitioner: GEOFFREY D. RANTZ, v. **Respondent:** THE PEOPLE OF THE STATE OF COLORADO.	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, October 2, 2006.
Justice Eid does not participate.

[SEAL]

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DISTRICT District Court, El Paso County, Colorado Court Address: 20 E. Vermijo Colorado Springs, CO 80903	(Filed Jan. 29, 2002)
People of the State of Colorado vs. **Defendant: GEOFFREY DEL RANTZ**	• COURT USE ONLY •
Deputy District Attorney: Heim Address: 105 E. Vermijo, Colorado Springs, CO. 80903 Phone Number: 520-6000 Attorney Registration #: 26092 District Attorney: Jeanne Smith, #11053	Case #: 01CR4048 Division #: 8 Courtroom #:
MOTION TO DISQUALIFY DEFENSE COUNSEL PUSUANT [sic] TO COLORADO RULES OF PROFESSIONAL CONDUCT 3.7 AND 1.7	

The People respectfully request this Honorable Court to disqualify defense counsel in the above entitled action pursuant to Colorado Rules of Professional Conduct 3.7 and 1.7. As grounds, the People State as follows:

1. On or about March 15th, 2001, Anthony Regalmuto, a minor child sixteen years of age, was placed on runaway status after fleeing the custody of his mother.

2. Subsequent police investigation suggested that Anthony Regalmuto ran away upon advice of the defendant with the defendant's support to live with the defendant. The defendant has been

identified by three separate witnesses as having been with the minor child in California. The minor child was recovered from California on January 5th, 2002.

3. On or about April 23rd, 2001, Detective Patterson of the Colorado Springs Police Department called Ann Kaufman, counsel for defendant, and informed her of Anthony Regalmuto's status and of her client's suspected involvement. Counsel for defendant assured Detective Patterson that the defendant was not harboring the minor child and did not know the minor child's whereabouts.

4. In June, 2001, counsel for defendant and Anthony Regalmuto had communications regarding Anthony Regalmuto's runaway status and his desire to emancipate himself from his mother. Counsel for defendant did not report this communication to the Colorado Springs Police Department, the Department of Human Services, or the minor child's mother. Rather, counsel for defendant referred the minor child to Carrie Clein, an attorney in Denver, for advice regarding emancipation proceedings. The minor child then called Carrie Clein after getting her phone number from counsel for defendant. See defendant's January 24th, 2002, filing of Detective Patterson's January 9th and 15th, 2002, reports.

5. Throughout the course of the current proceedings, counsel for defendant has requested the Court to initiate a Department of Human Service investigation of Anthony Regalmuto's mother and to appoint Anthony Regalmuto a guardian ad litem. Defense counsel has cited no specific reason for these requests except that upon her information and belief the child has been abused at the hands of his mother. Counsel for defendant

has not disclosed the source of her "information and belief." The child has disclosed no abuse in three separate law enforcement interviews that rises to the level of initiating a Department of Human Services investigation of his mother.

6. Second degree kidnapping charges have been filed in the instant action against the defendant for concealing the minor child Anthony Regalmuto from the rightful custody of his mother. Anthony Regalmuto is a material witness for the People in the second degree kidnapping charge.

7. Counsel for defendant is a material witness for the People in the second degree kidnapping charge.

8. Counsel for defendant is a material witness as to Anthony Regalmuto's credibility.

9. Colorado Rule of Professional Conduct 3.7(a) states that "(a) lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . "

10. Colorado Rule of Professional Conduct 1.7 deals generally with conflicts of interest. Rule 1.7 is similar to former Disciplinary Rule 5-102 and the progeny of cases DR 5-102 engendered.

11. *Riley v. District Court*, 181 Colo. 90, 507 P.2d 464 (1973) decided under DR 5-102 stands for the proposition that a lawyer cannot act as an advocate on behalf of her client and yet give testimony adverse to the interests of that client in the same proceeding.

1/29/02 /s/ Geoff Heim

Date By: Geoff Heim
Deputy District Attorney

Riley v. Dist. Ct. 181 Colo. 90 (Colo. 1973)

(507 P.2d 464)

Sidney A. Riley, Rollie R. Rogers and Edward G. Donovan v. The District Court in and for the Second Judicial District of the State of Colorado and Gilbert Alexander, one of the Judges thereof

No. 25805

Supreme Court

Decided March 12, 1973.

Original Proceeding

Rollie R. Rogers, State Public Defender, J.D. MacFarlane, Chief Deputy, William D. Neighbors, Assistant, for petitioners.

Jarvis W. Seccombe, District Attorney, Frederic B. Rodgers, Deputy, Joseph T. Carroll, Deputy, for respondents.

En Banc.

MR. JUSTICE DAY delivered the opinion of the Court.

Petitioners are the defendant Riley in a criminal action in Denver district court and the Public Defender and his Deputy – court-appointed counsel, who seek a writ in the nature of mandamus to require the Denver district court to permit counsel to withdraw and to cease representation of Riley.

Petitioner Sidney A. Riley (hereinafter referred to as Riley) was charged with the crime of first-degree murder for unlawful acts occurring on November 12, 1971. Petitioners Rollie R. Rogers and Edward G. Donovan (hereinafter referred to as Rogers and Donovan) were appointed

to defend Riley and have been the only defense counsel in the case. Petitioner Riley entered a plea of not guilty and trial commenced which resulted in a mistrial because the jury could not reach a verdict. Subsequently Riley entered a plea of guilty to the reduced charge of voluntary manslaughter, and a hearing was set to consider defendant's application for probation. At that hearing Riley moved to dismiss his appointed attorneys. Petitioners Rogers and Donovan also moved the court for leave to withdraw.

Both motions were denied. The court was advised that petitioner Riley wished leave to change his plea of guilty to the charge of voluntary manslaughter to not guilty. Ruling on this has been delayed pending disposition of this proceeding.

All petitioners have asked this court to issue an order commanding respondent District Court to permit the Public Defender to withdraw as counsel to represent Riley in any further proceedings dealing with his motion to withdraw his guilty plea.

As a general statement, an attorney who undertakes to conduct an action impliedly stipulates that he will prosecute it to a conclusion. He is not at liberty to abandon the suit without reasonable cause. Furthermore, an indigent defendant cannot dismiss appointed counsel without permission of the court. Likewise, counsel for an indigent defendant cannot withdraw without permission. Although never explicitly stated by this court, it seems to be the well-stated rule of law that motions for withdrawal of counsel are addressed to the discretion of the court and will not be reversed unless clear error or abuse is shown. We agree with those statements contained in *People v. Wolff*, 19 Ill.2d 318, 167 N.E.2d 197, wherein it was said:

" * * * A motion by an attorney for leave to withdraw for any reason is addressed to the sound discretion of the court and, like all motions, it may or may not be meritorious. For that reason, a burden rests with the moving party to prove to the court's satisfaction the legitimacy of the request, and when the petitioner either fails or refuses to do so, the court may properly deny the motion. * * * "

Smith v. United States, 122 U.S. App. D.C. 300, 353 P.2d 838; *State v. Avery*, 255 S.C. 570, 180 S.E.2d 190. *See also Martinez v. People*, 173 Colo. 515, 480 P.2d 843; *Altobella v. Priest*, 153 Colo. 309, 385 P.2d 585. *Compare with Raullerson v. Patterson*, 272 F.Supp. 495; *Raullerson v. People*, 157 Colo. 462, 404 P.2d 149. *See generally Granbouche v. People*, 104 Colo. 175, 89 P.2d 577.

The trial judge conducted an extensive examination regarding Riley's dissatisfaction with his court-appointed counsel. In addition, it is apparent that counsel had an intimate knowledge of the case as they had been associated for over a year and had already conducted one trial which resulted in a mistrial. In fact there is little in the record to suggest more than mere dissatisfaction with petitioners Rogers and Donovan. Thus, if the request was in connection with the trial of the charge, one could not say the court abused its discretion. However, the court misconceived the issues now before it when Riley moved for leave to change his plea of guilty to not guilty. The motion is grounded on the allegation that his guilty plea was induced by inadequate representation by his counsel. Therefore, if Rogers and Donovan were to continue to represent Riley, they would be in the inconsistent position of attempting to defend their own conduct while representing a client who is contending that he was not properly advised as to his plea.

The American Bar Association Standards for Criminal Justice Relating to Pleas of Guilty, Providing Defense Services, and The Defense Function are pertinent here. They provide in part:

"2.1 Plea withdrawal. [Relating to Pleas of Guilty]

* * *

"(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

"(1) he was denied the effective assistance of counsel guaranteed to his by constitution, statute, or rule;

* * *

"5.3 Withdrawal of counsel. [Providing Defense Services]

Once appointed, counsel should not request leave to withdraw unless compelled to do so because of serious illness or other incapacity to render competent representation in the case, or unless contemporaneous or announced future conduct of the accused is such as to seriously compromise the lawyer's professional integrity.

* * *

"8.6 Challenges to the effectiveness of counsel. [The Defense Function]

* * *

"(c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth

concerning the accusation, even though this involves revealing matters which were given in confidence."

The petitioners Rogers and Donovan would, in all likelihood, be necessary witnesses adverse to the interests of petitioner Riley at a hearing on the motion to withdraw the plea of guilty. It is obvious that a lawyer cannot act as an advocate on behalf of his client, and yet give testimony adverse to the interests of that client in the same proceeding.

It is, therefore, apparent that a serious conflict of interest would exist if we were not to order petitioners' requests. Neither the law nor common sense suggests that petitioners Rogers and Donovan can in the present posture of the 35(b) proceedings act as advocates on behalf of the petitioner Riley.

It is, therefore, ordered that the respondent trial court permit petitioners Rogers and Donovan to withdraw as petitioner Riley's counsel. We further order the respondent court to appoint private counsel on behalf of petitioner Riley.

The rule is made absolute.

MR. JUSTICE KELLEY does not participate.

DISTRICT COURT, COUNTY OF EL PASO, COLORADO Court Address: Clerk, El Paso Combined Courts 20 East Vermijo Colorado Springs, CO 80903 Phone: (719) 448-7650	
Plaintiff: The People of the State of Colorado v. **Defendant: Geoff Rantz**	(Filed Feb. 7, 2002) ^ COURT USE ONLY ^
Attorney for Defendant: Ann P. Kaufman 805 South Tejon Street Colorado Springs, CO Phone Number: 719-447-1511 FAX Number: 719-636-2111 Atty. Reg. #: 15089	**Case Number:** 01CR4048 **Div.: 8**

MOTION TO STRIKE PROSECUTIONS, MOTION TO DISQUALIFY DEFENSE COUNSEL AS MERITLESS AND GROUNDLESS AND MOTION FOR COSTS

In response to the prosecutions motion to disqualify defense counsel, counsel states:

1. The test in Colorado for Disqualification of Defense Counsel is laid out with specificity in *People v. Williams* 700 P.2d 549 (Colo. 1985). In the *Williams* case, Defense Counsel Ken Plotz, was subpoenaed to testify by the Prosecution against his own client. The court in *People*

v. Williams said that although the prosecution had not taken the step of actually filing a motion to disqualify the act of subpoenaing defense counsel is itself the functional equivalent of a motion to disqualify and analyzed the legal issues from that standpoint.

2. The Williams test is as follows:

   a. That defense counsel's testimony will be actually adverse to the accused.

   b. That the evidence sought to be elicited from the lawyer will likely be admissible at trial under the controlling rules of evidence.

   c. That there is a compelling need for such evidence, which cannot be satisfied by some other source. *Williams* at 555.

   The court further stated that "In order to permit meaningful appellate review of a ruling on a motion to quash a prosecutorial subpoena served on the accused's attorney for trial testimony, or, for that matter, on a motion to disqualify under DR 5-102(B) the court should make specific findings of facts and conclusions of law."

3. The Prosecution's motion fails on its face, as there have been no facts on the record other than baldly unsubstantiated meritless, failing assertions as to why or how Defense counsel could possibly be a witness against Mr. Rantz.

4. Contrary to the State's assertions, the state of the record in the case is that neither defense counsel has ever spoken to or met with Tony Regalmuto prior to the preliminary hearing. Counsel for Mr. Rantz elicited this testimony during direct examination of Tony Regalmuto at

the preliminary hearing. Counsel elicited this information as both advocates and officers of the court.

5. Counsel for Mr. Rantz would have as advocates been completely within their ethical bounds and obligations to have interviewed Tony Regalmuto as a witness if they had so chosen to, prior to preliminary hearing without revealing that fact to the prosecution or the police or turning over the work product contents of that interview. "Defense counsel, whether retained or appointed, must not be inhibited in his ability to vigorously investigate the factual circumstances of the case without fear that he may inadvertently be gathering evidence for use against his client." *Williams* at 554.

6. Defense Counsel will not be put in the position of affirmatively asserting any *revealing* defense strategy, interviews, work product, or attorney-client communications. The record in the case speaks for itself. See also *Wesp v. Everson* 33 P.2d [sic] 191 (Colo. 2001), which discusses the attorney-client privilege and unequivocally affirms the Williams test.

7. In *Williams* 700 P.2d [sic] 549 (Colo. 1985) and again in *Wesp* 33 P.2d 191 (Colo. 2001) the court states its concern that endorsing opposing counsel as a witness at trial could be a "device for forcing a particular lawyer to terminate his representation" of her client.

Wherefore, Counsel for Mr. Rantz is requesting that this court strike the pleadings on their face and award Mr. Rantz attorney fees for being requested to respond to the state's frivolous motion.

DATED February 7, 2002.

Respectfully submitted,

/s/ Ann P. Kaufman

Ann P. Kaufman (Reg. no. 15089)
805 South Tejon Street
Colorado Springs, Colorado 80903
(719) 447-1511
Dated: February 7, 2002

Certificate of Service

I certify that on 2/7/02, I served the foregoing document by delivering ✓ mailing _ same to all opposing counsel.
RU

DISTRICT COURT, EL PASO COUNTY,
STATE OF COLORADO

Criminal Action No. 01CR4048, Division 8

REPORTER'S TRANSCRIPT –
PRELIMINARY HEARING

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,

vs.

GEOFFREY DEL RANTZ, Defendant.

The hearing in this matter continued on Tuesday, January 29, 2002, before the HONORABLE THERESA M. CISNEROS, Judge of the District Court.

This transcript is a complete transcript of the proceedings held on this day in this matter.

* * *

[20] A. Yes, I tried.

Q. Were you able to find a Jacob Collins?

A. Yes.

Q. Has an individual been continuing to try to contact Tony Regalmuto through John Waldschmidt?

A. Yes.

Q. And have you been able to identify who that individual is?

A. No.

Q. Has that individual used other names?

A. Yes.

Q. After Jacob Collins – after you got the information about Jacob Collins, did you take steps to talk with Carrie Clein?

A. Yes, I did.

Q. And what steps did you take?

A. Well, I contacted her. I called her just right after John Waldschmidt contacted me and talked to her. And she said –

MR. LEVINSON: Judge, I object. Hearsay.

THE COURT: Objection is overruled.

MR. LEVINSON: Relevance.

THE COURT: Objection is overruled.

MR. LEVINSON: Materiality.

THE COURT: Objection is overruled.

[21] Q. (BY MR. HEIM) Can you answer the question, Detective?

A. Can you repeat the question?

Q. What did Carrie Clein tell you how she got in contact, if at all, with Tony Regalmuto?

A. She said that –

Q. Actually, let me rephrase that. That wasn't the question I asked. What steps did you take to talk with Carrie Clein?

A. I called Carrie Clein after John Waldschmidt contacted me. And she told me that she had been contacted by this Jacob Collins who was trying to retain her for Tony Regalmuto. She said she recognized that name due to Ann Kaufman had contacted her back in the summer or fall of 2001 trying to get or asked her to talk to Tony Regalmuto back then.

Q. What was the nature of that contact? What were they supposed to be taking about?

A. She said that Ann Kaufman was referring Tony Regalmuto to her because he had some legal questions and he asked some questions about the legal ramifications of the legal system and some questions about emancipation.

Q. And at that point would Carrie Clein tell you any more – any more detail about Tony Regalmuto?

* * *

DISTRICT COURT, COUNTY OF EL PASO,
STATE OF COLORADO

Case No. 01 CR 4048, Division 8

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO

vs.

Geoffrey Del Rantz,

Defendant.

The above-entitled matter came duly on for Continuation of Preliminary Hearing on February 11, 2002, before the HONORABLE THERESA CISNEROS, Judge of the District Court.

* * *

[219] MS. KAUFMAN: I'm sorry, Judge, is the one that told me today that Tony reported that he was being sexually molested by his mom. I only have known what the prosecution has told me. That's all I know because I will remind the Court I have never spoken to Tony Regalmuto. I don't have the slightest idea what Tony Regalmuto has said to the Prosecutors. Everything I know from them. So I don't want to – I don't know to get into that is this is all made up. He doesn't have any idea what anybody knew what – there's no evidence in this case that Geoff Rantz knew Tony Regalmuto at the time that he said to Ms. Eilertson that Tony is my nephew. We don't even have a date, place, and time of the conversation.

THE COURT: Nor do we – do you think a date, time, and place makes any difference?

MS. KAUFMAN: Well, sure because I could dispute that it never even took place.

THE COURT: Can you narrow down what she's going to say that happened? Do you know –

MR. HEIM: That he was working at the Department of Human Services with her which in that two year time frame – I can't be more specific than that today. I think Ms. Kaufman, with all due respect, is just missing the point. The point is that he lied about these very specific things that there was absolutely no reason to lie if he wasn't covering something up.

THE COURT: That's certainly a reasonable argument from

* * *

DISTRICT COURT, COUNTY OF EL PASO,
STATE OF COLORADO

Case No. 01 CR 4048, Division 8

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO

vs.

Geoffrey Del Rantz,

Defendant.

The above-entitled matter came duly on for Motion Hearing on April 30, 2002, before the HONORABLE THERESA M. CISNEROS, Judge of the District Court.

* * *

[134] preliminary hearing. You know, the theft counts and –

MR. HEIM: No.

THE COURT: Okay. J goes to the issue that – I mean I know they would call Carrie Kline as a witness.

MS. KAUFMAN: I would also – I'm asking to strike any reference – I mean you have settled the issue about whether I had contact with Tony Regalmuto while he was in California. And if we haven't – I guess we better reraise it and get to done but I'm – although I know I don't have to do this, I'm offering as an officer of the Court that I did not. And I am – do not want to get into what I said to detective, you know, the conversation Detective Patterson

testified because I would tell the Court that is not at all what I said – I said to him. What I said to the police officer that calls me and says, "Do you have any contact with Tony Regalmuto?" So I wouldn't have said anything. I'm never going to advise a client to commit a crime, and I cannot reveal any attorney/client privilege. These are my standard answers for those questions. I don't think what I said to him is relevant here and I'm asking any reference to me personally be out of this case.

THE COURT: Mr. Heim?

MR. HEIM: Judge, I would ask to – just that the Court delay ruling on that until we hear what Tony Regalmuto has to say in his evaluation. If he says, you know, we had Wil Drexler contact me for an interview, but I didn't want to have one until I [135] talked to Mr. Gordon first that's something different that comes out from whatever the defense is saying, I think, yeah, it's relevant.

MS. KAUFMAN: Well, I will say we have heard the preliminary hearing testimony. And I will tell the Court that Mr. Drexler went and contacted him in Canon City. That's already come out, he said he wanted a guardian. There's been no other contact. The only other time Mr. Drexler has seen Tony Regalmuto is at Ber Lai's house or restaurant in the offer of proof I did to the Court. I am not, A, Mr. Drexler and, B, that is what has occurred here. And the Court has heard testimony from Tony already that he doesn't know me. He never told anybody he talked to me. And he hasn't. So I'm – the Court knows me – and Mr. Heim should know, although I don't think I had to do this because it's a [sic] attorney/client privilege. I have had no contact with this child. So I don't – I didn't do any more than put my entire ethical reputation on the line to make

that statement to the Court and I don't think anything I said to Detective Patterson when he called me and ask me did I know where Tony Regalmuto was which he did, I don't think that is relevant. I didn't know where he was, and I answered the question the way I always answer those questions. And otherwise it becomes about me. And it's – this is not a trial about me.

MR. HEIM: I'm not talking about that portion, Judge. I'm saying that the investigative teams alleged contact. I mean [136] we kind of figured out different things every time we come before the Court, and at some point when Tony Regalmuto's credibility comes up against his brother, and Geoff Santistevan and the implication that the Prosecution and the police have been behind manufacturing a story against Geoff Rantz, Ms. Kaufman and her team has been involved since day one in the investigation of that case. In a lot of ways things took place in terms of the pleadings and investigations has been a cause of the defense involvement. That hasn't been a normal crime that was committed. You go out and you have investigation, then we present it for filing. There's been involved in the whole way along.

THE COURT: Here's what we are going to do in that regard: I'm going to withhold ruling because I don't know what Tony is going to say at this point. I have a general idea but I don't know for sure. But Mr. Heim, to the extent that you believe what the defense did or didn't do became relevant, approach the bench before you ask the questions.

MR. HEIM: Of course.

MS. KAUFMAN: I will tell the Court I don't have any objection to introducing questions about Mr. – I

mean what I don't have any objection to that – I mean that's – I'm telling him what we did. I have told the Court that that's – we are done. I don't know if I care about asking him or Detective Patterson specifically if he saying in the elicit that my conversation with him. I'm asking for that to be out because I

* * *

DISTRICT COURT, COUNTY OF EL PASO,
STATE OF COLORADO

Case No. 01 CR 4048, Division 8

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO

vs.

Geoff Dale [sic] Rantz,

Defendant.

The above-entitled matter came duly on for Jury Trial on May 22, 2002, before the HONORABLE THERESA CISNEROS, Judge of the District Court.

* * *

[276] wondering if you want to take a morning break before you start?

MR. LEVINSON: Yes, sir. (Sic) If the Court would allow us to do that. I don't want to break my argument.

THE COURT: No, I understand, Mr. Levinson. So I'm going to go ahead and take our morning break. It's a little bit early. So it will be for 15 minutes. So if you will be back in the jury room at 10:15, we will get started right after that.

(Recess taken.)

THE COURT: We are back on record in People versus Geoff Rantz. Mr. Rantz is here with both of his counsel. Mr. Heim and Ms. Mullaney are here for the Prosecution with all 14 members of your jury. Mr. Levinson.

MR. LEVINSON: Thank you, Your Honor. Good morning.

JURY PANEL: Morning.

MR. LEVINSON: In the early spring of 1996, Phyllis Regalmuto who you now know is the mother of Andrew and Tony and who as of January 13, 1998, become [sic] the Court appointed guardian of Geoff Santistevan had a huge problem. Ms. Regalmuto had been sexually abusing her sons Andrew and Tony for years. And Tony was about to let someone know that the abuse was happening. Tony was 10 years old. He had all the symptoms of a person who was suffering child abuse at the hands of the family. He was suicidal. He wet his bed at night. He had problems with his bowel movements. He was depressed and he goes to his mom Phyllis Regalmuto, "Mom, it's got to end." Phyllis cut a deal with her [277] son, Tony. If Tony didn't tell, if Tony didn't make it known to other people that she was abusing him, she would let him live somewhere else. She would let him go live with the new friends of the family, Geoff Rantz, who they had met at church. Now Geoff likes the Regalmuto boys and thought Phyllis was an okay person. And he agreed that Tony would come and stay with him for a short period of time so that he could take a break from his mother.

Fortunately for Tony but unfortunately for Geoff Rantz the days turned into weeks. The weeks into months, and the months into years. Manipulating the 20 year old

Geoff Rantz. That's how long it was when this arrangement was struck, manipulating the 20 year old Geoff Rantz was no problem for this 40-plus-year-old woman. As you will see, as you will hear, she is a master of creating fiction and a master at lying to protect her own interests. The most important fiction or at least the most important fiction in her mind was that she and the boys were the victim of an abusive husband. That it was the abusive husband that caused Tony's symptoms to appear. And what caused him to wet his bed, be depressed, have problems with his bowel movements. When in reality it was Phyllis Regalmuto's own abuse that was causing those symptom. Keep in mind those symptoms all appeared before this family ever knew Geoff Rantz.

On October 2, 1996, Phyllis Regalmuto filing [sic] an action in a court in the State of Illinois that is where this family was from. That's where dad lived, alleging under oath that her son [278] Andrew was the object of improper sexual activity on the part of her husband. She raised their hand and signed a document under oath saying, "My husband Andrew senior is abusing my son Andrew Junior." And then as a result of the boys [sic] should no longer have contact with their father. The boys were supposed to visit with dad. She knew that Tony was beginning to question whether or not it was proper for mom to do the kind of things that she was exposing to him. And she was concerned that if the boys went to Illinois and spent time with dad, that dad would find out about the abuse.

Phyllis turned the boy's symptoms from much concern about how she is raising her kids or what she is doing to them, to a condemnation of her husband. Tony Regalmuto, her younger child, the taller of the two boys you saw on the screen will tell you that his mother, Phyllis Regalmuto,

not Geoff Rantz, but his mother, Phyllis Regalmuto, told him what to say about dad. She told him and rehearsed him on how to accuse their father of sexual abuse. Tony will tell you that he had an okay relationship with his dad. Says his father isn't probably the world's best dad but the worst thing his dad ever did to him was not nearly as dad [sic] as what the police say it was. Sure. Tony will tell you that his father would shower with him. He would have Tony wash a certain way. Stuff like that was going on at the house as well.

Phyllis, his mother, would be home also. Tony will tell you that his mother makes up a story about a doll named [279] Hasbro, actually it wasn't a doll. It was a name that they used for a penis that Hasbrow was his mother's creation. When asked how he is able to retain the fiction, the story, that dad abused him this story that mom created Tony will tell you that she went over the story with him a few times.

The two boys because of these allegations are evaluated. And the conclusion that the evaluators reach is that they are the object of improper actions on the part of their dad. And now it's important to note that the evaluator found that there was improper action, something was going on. Now because the boys were saying it was dad, because that's what mom told them to say, the evaluator reached the conclusion that since we are seeing symptoms of abuse, since we are seeing that these kids are troubled, that there's something wrong here and since they're saying that it's dad, it must be dad. Not mom. And the evaluator says that the children should no longer have any contact with dad. That they should not be allowed to visit with dad.

So the first part of Phyllis [sic] plan works. Tony is not going to see his father. And Andrew is not going to see his father. All unsupervised contact between these two young boys and their father is cut off. He's allowed no telephone contact with them. She isolates them from the one person that they knew they could go to for help, around the sexual abuse that Phyllis was perpetrating on the boys. Phyllis no longer has to worry about being accused of being an abuser. The problem is gone. Tony is

* * *

DISTRICT COURT, COUNTY OF EL PASO, state OF COLORADO

Case No. 01 CR 4048, Division 8

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE state OF COLORADO

vs.

GEOFFREY DEL RANTZ

Defendant.

The above-entitled matter came duly on for MOTION HEARING on APRIL 8, 2004, before the HONORABLE THERESA M. CISNEROS, Judge of the District Court.

APPEARANCES:

FOR THE PEOPLE: Amy Mullaney, Reg. No. 26338

FOR THE DEFENDANT: Alan Gasper, Reg. No. 31255
Walter Theis, Reg. No. 30830

* * *

[70] Q. How do you spell that?

A. [T.R.] L-A-I.

Q. So what do you do?

A. So I just kind of formulated a plan to take off.

Q. Did you formulate a plan to take off?

A. Yeah.

Q. Where were you going to go?

A. Out to California.

Q. Did you do that?

A. Yes.

Q. When did that happen?

A. That happened the night that my aunt and uncle were leaving for Italy.

Q. Give an approximate date?

A. Middle of March, mid to end of March.

Q. Of what year?

A. Of 2001.

Q. So you went to California. What did you do when you got there?

A. Tried to find a place to stay, like I just kind of duck out.

Q. Where did you stay?

A. Ended up staying with my friend in LA.

Q. How long were you there?

A. In California? For about a year. Until January of [71] 2002.

Q. So you basically ran away from here?

A. Yes.

Q. Did you ever contact with anyone in Colorado after you were in California?

A. Yes, sir.

Q. Who do you contact?

A. Ann Kaufman, Carrie Clein. Talked to my friend Ber a couple of times.

Q. Why did you call Ms. Kaufman?

A. To see that if I could find somebody that would help me emancipate in California.

Q. What does emancipate mean?

A. Make me legally on me own so I'm responsible for myself.

Q. So that you don't have to go home to?

A. To – I don't have to answer to anybody. So I don't have to go home to my house.

Q. Did you give – Ms. Kaufman give you any advice?

A. She told me that she knew somebody up in Denver that I could call who was Carrie Clein. And so I called her, and it turned out she couldn't do anything. She just said turn myself in.

Q. Did you only have phone contact with Ms. Clein?

A. Yes, sir.

[72] Q. How many times did you contact Ms. Kaufman while you were in California?

A. Two that I recall.

Q. I'm sorry?

A. Two that I recall.

Q. At the time you contacted Ms. Kaufman, you were a run away from this state?

A. Correct.

Q. Ms. Clein give you any advice at all?

A. As far as?

Q. You told her what you needed?

A. Right.

Q. What you told her is that Ann Kaufman had asked you to call her?

A. Yeah.

Q. After you told her what you wanted, did she give you any advice?

A. Ms. Kaufman?

Q. Ms. Clein.

A. Ms. Clein. She said that the best thing she could tell me is turn myself in. And that if I want to do anything with what I wanted that I would have to come back to Colorado.

Q. Did Ms. Clein now [sic] you were a run away at the time?

A. Yes.

Q. Did you come back to Colorado?

[73] A. Not against my will.

Q. You said not against your will?

A. I said against your will.

Q. What happened then?

A. When I was brought back?

Q. How did you get back here?

A. Well, I was in the Internet Cafe, a couple of detectives I guess from Riverside came in and picked me up, and cuffed me and took me down to the police station. And they tried to contact Detective Patterson, and my mother, and couldn't get a hold of either of them. So they took me to a place called Safe House which was like a group home type place, and I was there for about two to three days. And then on the third day it was like 4:30 in the morning a couple of guys came to pick me up and drove all the way to Vegas, got on a plane back here. When I arrived here, I was met by officers in uniform, and Mr. Brown and Detective Patterson.

Q. Is that Payton Patterson?

A. Yes, sir.

Q. Approximately what time was that? What time period when you came back?

A. I was brought back January of 2002.

Q. Let me go back a second. You said ran away to California, when what was that again?

A. That was in March of 2001.

[74] Q. 2001. So in between March of 2001 and January of 2002 you were in California?

A. Uh-huh.

Q. Approximately what were the dates of your contact with Ms. Kaufman, do you know?

A. Around June. June, July.

THE COURT: Of '01?

BY MR. GASPER:

Q. I was going – of '01?

A. Yes.

Q. What happened when you got back to Colorado?

A. Detective Patterson and Dick Brown took me to the Police Operations Center in Colorado Springs and questioned me for hours. And I was telling them, you know, what happened but they kept on putting words in my mouth.

Q. You said you were telling them what happened, what did you tell them?

A. I was telling them, you know, Geoff hasn't done anything, that my mom is the one that, you know, should be under a microscope here, you know, telling them not to say anything. That just say, "Well, you know what about Mr. Rantz, you know, or you – didn't this happen this way or don't you mean this?"

Q. Did you go into the same detail with them that you did in court this morning?

A. No, I didn't because they weren't listening to me so I [75] figured it would be no use.

Q. Where did you live after you got back to Colorado?

A. Well, same thing happened. They brought my mom down there and told me, you know, I'm going to go home with her and again I refused. So they sent me with my aunt Rita which I stayed at her house for a night or two. Then I went to my aunt Debbie's and uncle John Wald Schmidt in Canon City.

Q. Do you have any other contact with Ms. Kaufman after you arrived in Colorado?

A. Further down the road, yes.

Q. Approximately when did that occur?

A. I don't remember the date it was. Before I was – it was briefly before I was going to be called for trial which I was never called for.

Q. You testified at a preliminary hearing?

A. Yes, I did. It was after the preliminary hearing.

Q. What was the next contact with Ms. Kaufman? Is that what you're saying?

A. Right.

Q. When you were in contact with Ms. Kaufman, you said she knew you were a run away?

A. Yeah.

Q. Did you ask her not to tell anybody you were there?

A. Yeah, I said. I mean, "Don't tell anybody I'm here." She said, "Well, this phone call never happened."

[76] Q. I'm sorry. Would you repeat that?

A. She said, "This phone call never happened." She was actually the one telling me, you know, we never spoke.

Q. Your Honor, may I approach? Mr. Regalmuto, I'm handing you what's been – what we are asking to mark as Defendant's Exhibit C. Have you seen this document before?

A. Yes.

Q. Can you explain to the Court what this is, please?

A. This is a letter that I wrote to Ms. Clein.

Q. Do you know about when you wrote this letter to her?

A. It was about the time I was in contact with her, June, July 20th '01.

Q. While you were in California?

A. Correct.

Q. Take a just minute and look over the document. You don't need to read the entire thing at this point.

A. (Witness reviewing document.)

Q. Is this a fair and accurate representation of what you wrote?

A. Yeah.

Q. You recognize your own handwriting?

A. Yes, sir.

Q. Do you any questions about this document?

A. No.

MR. GASPER: Your Honor, if the record could reflect I [77] gave a copy of this document to the Prosecution?

THE COURT: Yes.

MR. GASPER: And I would like to offer this now as Defendant's Exhibit C into evidence as Defendant's Exhibit C.

(Whereupon, Defendant's Exhibit C was offered into evidence.)

MS. MULLANEY: Judge, Could I voir dire just briefly about foundation?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MS. MULLANEY:

Q. Tony, is this the actual letter that you sent to Carrie Clein?

A. Yes, ma'am.

Q. How was that you have a copy of it?

A. He just handed it to me.

Q. Okay. So you didn't keep a copy of it for yourself?

A. After I was brought back to Colorado I obviously didn't have anything with but the clothes on my back.

Q. If this is not a copy you kept, do know where Mr. Gasper got this copy?

A. Got it from Geoff's sister, Lisa.

Q. Okay. Do you know where Geoff's sister Lisa got this copy?

A. I don't know.

[78] Q. You hadn't given her a copy?

A. I may have. I don't recall.

Q. Okay. In any event, Tony, is it your testimony that is the actual letter you sent to Carrie Clein or is this just the best you could piece together after the fact about what you had written her?

A. This is particular – like the exact letter that I wrote.

Q. Okay. Do you have the envelope that was sent in post marked?

A. Obviously not.

Q. Okay.

A. Like I said I had nothing with me when I was taken back to Colorado.

Q. So you think that Geoff Rantz' sister gave this letter to Mr. Gasper?

A. I'm assuming. I don't know. She may have gotten it from Ms. Clein.

MS. MULLANEY: Judge, with those qualifications, no objection to it's admission.

THE COURT: All right. Exhibit C is admitted.

(Whereupon, Defendant's Exhibit C was received in evidence.)

BY MR. GASPER:

Q. Just to clear this up, Mr. Regalmuto, did you mail this [79] letter or fax it to Ms. Clein?

A. I faxed it.

Q. So there was an original document at one point?

A. Yes.

Q. The copy of that I have handed you and marked for identification is a copy of the letter that you sent; is that correct?

A. Correct.

Q. You said this letter was sent in the summer of 2001?

A. Uh-huh, yes.

Q. Could you take a moment, please and look over that letter and then read that to us?

THE COURT: I can read it. If there's a letter he doesn't need to read it.

MR. GASPER: It's just difficult to read. I want to make sure it was clear for the record. I was having a difficult time.

THE COURT: It's not necessary. I can read his handwriting. It says what it says.

MR. GASPER: If I could have one second, please?

THE COURT: Yes.

BY MR. GASPER:

Q. Okay. You said that you were transported back to Colorado?

A. Correct.

[80] Q. By basically the police?

A. They said they were from some parent help place based in Utah or Wyoming or some place out of Colorado that wasn't in Colorado.

Q. When you arrived, you went to a place that you were interviewed?

A. Correct.

Q. At this time you tried to explain that this was because of your mother and not by Geoffrey Rantz?

A. Yes, sir.

Q. You stated that they won't listen to you?

A. Yes.

Q. You testified earlier that your mom abused you, have you made these allegations to anyone other than your therapist Ron Baptist?

A. To him. I told it to, like I said, to Detective Matiatos. I mean I have him telling people like anybody that interviewed me since I was brought back from California, you know, or tried to start telling them which nobody really wanted to listen to. I mean with Ron Baptist, I took a MMPI polygraph which backed up exactly what I had to say.

Q. Did you ever have any involvement with the Department of Human Services over this?

A. No. Nobody from DHS talked to me about it.

Q. Did you ever tell your brother about this abuse?

[81] A. Well, he already knew about it.

Q. Did you live for a short period of time in Canon City?

A. Yes, sir.

Q. And while you were in Canon City, did you ever have any opportunity to talk to the Department of Human Services there?

A. There was one woman that came out. I remember talking to her. I don't remember – remember all the details about it. But I remember somebody came out to my uncle and aunt's house.

Q. What about in El Paso County? Was there anyone here that dealt with you from the Department of Human Services?

A. No.

Q. After you left Canon City, where did you live?

A. I lived with my friend Ber Lai.

Q. And where does he live?

A. Manitou Springs.

Q. When you were in Manitou Springs, did you ever have any interaction with the Department of Human Services?

A. There were a couple of women that came out to make sure my living situation was okay and that was it.

Q. So the Department of Human Services was involved?

A. For a day, they weren't asking me about this. All they did was walk through the place where I was staying, and they said, "This is okay?"

Q. Did you ever tell them about the alleged abuse by your mom?

[82] A. No, because they – they said they weren't there for, you know, anything like that. They just wanted to make sure it was okay where I was staying.

Q. You stated earlier that you testified at the preliminary hearing; is that correct?

A. Correct.

Q. And you didn't talk to Ms. Kaufman until after that hearing?

A. Not in person, no.

Q. During that hearing you were asked – you were asked is you had contact with Ann Kaufman while you were residing in California?

A. Uh-huh, yes.

Q. How did you answer that question?

A. I said I hadn't. Had not.

Q. But today you are testifying that you had contact with her while you were in California?

A. Yes, sir.

Q. So why did you say in the prelim that you did not have contact?

A. Because Ms. Kaufman said not to ever say that I had contact with her because it could hurt Geoff's case and hurt her.

Q. Hurt Geoff's case and hurt her?

A. Yes. She would be in a lot of trouble so don't mention it.

[83] Q. Did she tell you why?

A. She said it's a conflict because Geoff is her client, and I'm not. So she's not supposed to be talking to me.

Q. So you didn't tell the truth at the prelim about that?

A. No, I did not about that.

Q. But you are telling the truth today?

A. Yes, sir.

Q. Why should we believe you today?

A. There's no way I can force you to believe me. But I'm telling you exactly what happened.

Q. Are you making this up?

A. No, sir.

Q. You also were supposed to testify at trial?

A. Yes, sir.

Q. Do you ever have an opportunity to testify at trial?

A. No.

Q. Did you meet with Geoff Rantz' attorneys before you were supposed to testify?

A. Yes, sir.

Q. Did they go over when you were going to testify about when you meet with them?

A. Yes.

Q. Were you prepared to testify?

A. I was ready to, yes.

Q. Why didn't you?

[85] A. Because the morning that I was supposed to testify, went over to Rick Levinson and Ann Kaufman's office and they said "We are not going to put you on the stand because you have – we think that they are going to tear you apart, and we could get everybody in trouble."

Q. What do you mean we could get everybody in trouble?

A. Geoff and her.

Q. Her meaning Ann Kaufman?

A. Yes.

Q. Did she say that she could get in trouble at that time?

A. Yes.

Q. Did she tell you why?

A. She said cause she didn't want me to say anything that, you know, would hurt – which is basically meaning I had contact with her when she was telling me not to say.

MR. GASPER: That's all I have right now, Your Honor.

THE COURT: Thank you, Ms. Mullaney, cross.

CROSS-EXAMINATION

BY MS. MULLANEY:

Q. Tony, what year were you born?

A. 1985.

Q. Okay. So in 1996, how old would you have been?

A. I would have been 11.

Q. Were you living with your mom or Geoff Rantz at this time?

* * *

DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO

Case No. 01 CR 4048, Division 8

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO

vs.

GEOFFREY DEL RANTZ

Defendant.

The above-entitled matter came duly on for MOTION HEARING on APRIL 8, 2004, before the HONORABLE THERESA. M. CISNEROS, Judge of the District Court.

APPEARANCES:

FOR THE PEOPLE:	Amy Mullaney, Reg. No. 26338
FOR THE DEFENDANT:	Alan Gasper, Reg. No. 31255 Walter Theis, Reg. No. 30830

* * *

[100] THE COURT: All right. Thank you. Hello, this is Judge Cisneros.

THE WITNESS: Yes, Judge. This is Carrie Clein.

THE COURT: Ms. Clein, we are going to have you appear by phone. We have Mr. Gasper, Ms. Mullaney, and Mr. Theis, as well as Mr. Rantz. Will you raise your right hand for me, please.

CARRIE CLEIN

called as a witness herein, having been first duly sworn was examined, and testified as follows:

MR. GASPER: Do we need to go to the bench?

THE COURT: You might want to. Maybe that – she will have trouble hearing you.

DIRECT EXAMINATION

BY MR. GASPER:

Q. Ms. Clein, would you state your name, spelling your last name for the record.

A. Yes, my name is Carrie Clein. The last name is spelled, C-L-E-I-N.

Q. What is your business address?

A. 1623 Washington Street, Denver, Colorado.

Q. And what is your profession, ma'am?

A. I'm an attorney.

Q. How long have you been practicing law in the state of Colorado?

A. Since 1984.

[101] Q. Is this the only state that you have a license to practice?

A. Yes, it is.

Q. Do you know Anthony Regalmuto?

A. Yes, I do.

Q. How?

A. Well, I don't know him. I have spoken to him on the phone, yes.

Q. Were you aware of Anthony Regalmuto?

A. Yes.

Q. And how did you know him or have became aware of him?

A. He contacted me. He was a victim in a case and had contacted me regarding questions that more had to do with dependency and neglect type of issues.

Q. And what was the approximate date of his contact with you?

A. It would have been – if I could refresh my recollection by looking at my report?

Q. That's fine. Thank you.

A. It would been the first part of July 2001.

Q. How did Anthony Regalmuto find you as an attorney?

A. My understanding is that – and I got a phone call originally from Ann Kaufman who was a criminal defense lawyer in Colorado Springs who I'm affiliated with because we were both Public Defenders. And she said that one of the witnesses in her [102] case that she had was trying to ask her questions. She obviously could not answer them. And asked if she could make the referral. And then he called me several weeks later.

Q. Were you aware at the time that Anthony Regalmuto was a run away from Colorado?

A. That was unclear to me. I will tell you that when I talked to him I had real – I had questions about that. What I was having trouble identifying was what type of action that might have been out of it.

Q. Did you advise Anthony Regalmuto in anyway?

A. Yes.

Q. Was that a yes? I'm sorry.

A. Yes, it was.

Q. Could you disclose what the nature of that advice was?

A. I cannot because I have not – unless the Court orders me to, I have not received a waiver of the attorney/client privilege since if I could refresh my recollection by looking at the waiver. January 15th of 2002.

Q. Mr. Regalmuto testified on the stand that your advise [sic] was to turn himself in. Can you comment on that at all?

A. I cannot comment on that without the instruction from the court.

Q. I understand. Did you provide – did Mr. Regalmuto ask you to provide services to him as an attorney?

A. That is the direction that he was going, yes.

[103] Q. Did he – did you, in fact, provide any services for him?

A. You need to define that for me.

Q. Other than the limited advise that you gave that you are unable under confidentiality standards to disclose, did you accept him as a client on retainer?

A. No, I actually did not.

Q. Did Mr. Regalmuto send you any documents at all?

A. He faxed to me a written statement at one point during the period of time that he had contact with me.

Q. I sent you last night a copy of a letter that I had in my possession that I had marked as a Defendant's Exhibit B. I faxed this to you approximately 5:00 or 6:00 last night; is that correct?

A. Yes.

Q. Did you have a copy of what I faxed as Defendant's Exhibit C?

A. I do. I have it here.

Q. I would state for the record that the document that I faxed to Ms. Clein is the same document that I admitted into evidence today.

To the best of your knowledge, I know that a couple of years have gone by since you had contact with Mr. Regalmuto but to the best of your knowledge does that look like the letter that Mr. Regalmuto faxed to you?

[104] A. It does. It looks like the letter. I have not seen this letter for quite some time.

Q. Just from looking at the letter it does appear to be the same letter that he faxed to you at the time that you received it?

A. Yes. And if he were to have said that it was, then it was.

Q. What, if anything, did you do with that letter that Mr. Regalmuto sent to you? Did you share that with anyone or is it retained only in your file?

A. At the time it was retained only with me, and I – I guess what happened to it I'm not sure because after he – I decided that I wasn't going to be his lawyer, I didn't keep that letter any longer but I never shared it with anybody. It was privileged communications.

MR. GASPER: Nothing further at this time.

THE COURT: Ms. Mullaney.

CROSS-EXAMINATION

BY MS. MULLANEY:

Q. Ms. Clein, hi. It's Amy Mullaney. I'm with the DA's Office?

A. Hello.

Q. Hi. How long a conversation total do you have with Tony?

A. I'm going to have to guess. And I apologize. This was [105] a long time ago. I am going to say two to three at the very most.

Q. Okay. At what point in those conversations did you get the faxed letter?

A. I want to say it was before the last time that I spoke to him, but I can – could be mistaken about that. Like I said that was a long time ago. And I wasn't anticipating having to testify about it.

Q. Sure. Would you have read, the letter at the time that you received it?

A. Yes, I would have.

Q. Have you had a chance to read Defendant's Exhibit C that you have now?

A. Yes.

Q. And do you note, obviously the part where I'm interested in is talking about Tony being the victim of some form of sexual assault. Do you see that in your letter?

A. I do.

Q. Was that in the original letter that he sent to you?

A. Yes, there were – those were issues that were also directed or addressed, yes.

Q. Do you talk to Tony about those?

THE WITNESS: Judge, I'm going need some direction. I feel like we're approaching a line of the attorney/client confidentiality. I don't have a waiver.

THE COURT: Ms. Mullaney, what is your position on [106] that?

MS. MULLANEY: I think the client has implicated or explicitly waived already by testifying that he did have conversations by putting the letter into evidence.

MR. GASPER: Your Honor, if I may, the witness is still in the hall. And I'm sure that he would be glad to waive to allow you to move through this line of questions.

THE COURT: Bring Mr. Regalmuto in please.

MR. GASPER: Oh, he is here.

THE COURT: Mr. Regalmuto, I need you to come up to the podium. Actually, why don't you come on up here so that Ms. Clein can hear. Ms. Clein, this is Judge Cisneros. Mr. Regalmuto has approached the bench. And Mr. Regalmuto, a couple of questions. You gave testimony regarding this Defense Exhibit C which is the letter that you said you faxed to Ms. Clein. And you also talked about some conversations that you had with her when you were attempting to engage her services. Under usual circumstances, her communication with you and your communication with her are privileged. Okay. And she is not allowed to disclose her conversation with you, absent two things, either you agree that she can disclose them or I order her to disclose them because I can make a legal finding that you have waived any privilege that you may have had with respect to your conversation with Ms. Clein. Do you have any questions about my explanation to you regarding your privilege?

[107] MR. REGALMUTO: No.

THE COURT: What is your position on whether or not Ms. Clein is able to disclose to the Court and to the

Prosecution and to Mr. Gasper the contents of the conversation that you had with her and she had with you? What is your position on that?

MR. REGALMUTO: That's all right with me if she discloses that information.

THE COURT: Ms. Clein, were you able to hear that?

MS. Clein: No, I was not.

THE COURT: He said it was okay if you disclose the said information.

MS. Clein: All right.

THE COURT: All right. So we have his direct waiver for your benefit, Ms. Clein. Thank you, Mr. Regalmuto.

MS. MULLANEY: Judge, I would like the sequestration order to continue to be in effect. I don't know what other people they are going to call.

THE COURT: I need all witnesses who were here and have testified to step back out in the hallway for me. You are under the same order not to discuss your testimony with any other witness.

MR. REGALMUTO: Okay.

THE COURT: Thank you.

MS. MULLANEY: I think that Mr. Aldrich was in here earlier also?

[108] MR. GASPER: He is in the hall.

THE COURT: All right. Go ahead, Ms. Mullaney.

MS. MULLANEY: Thank you.

BY MS. MULLANEY:

Q. Ms. Clein, I think we were going to ask you about what advise, if any, you gave him regarding the sexual assault allegations he alluded to?

A. I can only tell you very generally if that's all right. I don't remember specifically but my advice always was with regard to any of it that it was apparent he needed to turn himself in. And one way to clear this up and a very good way would be to talk to people about it. To talk to the authorities about it.

MS. MULLANEY: Okay. Thank you very much. I have nothing further.

THE COURT: Thank you. Mr. Gasper.

MR. GASPER: No other questions, Your Honor.

THE COURT: Ms. Clein, we thank you for appearing by phone. We are hanging up.

THE WITNESS: Thank you.

THE COURT: Do you have another witness, Mr. Gasper?

MR. GASPER: Your Honor, we would call Rick Levinson to the stand.

THE COURT: All right. Mr. Levinson, come right up here in front of me, please. Come on up.

RICK LEVINSON

* * *

DISTRICT COURT, COUNTY OF EL PASO,
STATE OF COLORADO

Case No. 01 CR 4048, Division 8

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vs.

GEOFFREY DEL RANTZ

Defendant.

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APPEARANCES:

FOR THE PEOPLE: Amy Mullaney, Reg. No. 26338

FOR THE DEFENDANT: Alan Gasper, Reg. No. 31255
Walter Theis, Reg. No. 30830

* * *

[140] THE WITNESS: Thank you, Judge.

THE COURT: Mr. Gasper, do you have another witness?

MR. GASPER: Well, I do, Your Honor. However, I'm showing it's quarter till, does the Court want to continue?

THE COURT: I'm showing it's 20 till. We have all kinds of time.

MR. GASPER: We call Ann Kaufman.

MR. LEVINSON: I will get her for you.

THE COURT: All right. All right. Ms. Kaufman, come right up here in front of me, please. Come on up.

ANN KAUFMAN

called as a witness herein, having been first duly sworn was examined, and testified as follows:

THE COURT: Go ahead and be seated in the witness box, please.

DIRECT EXAMINATION

BY MR. GASPER:

Q. Good morning, Ms. Kaufman.

A. Good morning.

Q. Would you state your name and spell your last name for the record, please.

A. Ann Kaufman, K-A-U-F-M-A-N.

Q. Your address is here in Colorado, Colorado Springs? Your business address?

A. That's okay. 90 South Cascade, Suite 720, Colorado [141] Springs, 80903.

Q. That's in El Paso County?

A. That is correct.

Q. What is your profession?

A. An attorney.

Q. And your educational background?

A. I graduated from the University of Colorado Law School in 1985. And so I went to Colorado and then I went to law school.

Q. And law school was at the University of Colorado?

A. Correct.

Q. What did do after you graduated?

A. I worked for the legislature as a legislative drafter for about a year and, a half. And then I was hired as a Public Defender Colorado, state Public Defender. Was a Colorado state Public Defender until approximately I believe it's going to be six years ago this August. Was office head at the Colorado Public Defender's Office for three or four years. And then I went into private practice specializing in criminal defense approximately about six years ago.

Q. You're still in private practice?

A. I am.

Q. You recognize Mr. Geoff Rantz?

A. I do. He's lost a lot of weight but I recognize him.

Q. Do you know Mr. Rantz?

A. I do.

[142] Q. How do you know him?

A. He was a client of mine.

Q. And when approximately did Mr. Rantz retain you as counsel?

A. I'm thinking it was January, between January and February of '01.

Q. You represent Mr. Rantz in trial in Colorado Springs?

A. I did.

Q. Were you here today on 01 CR 4048?

A. Okay.

Q. Is that the case that you represent him on?

A. No idea the case number but if you say it is I will believe you.

Q. That's the case that involved Geoff Santisteven and Phyllis Regalmuto and Andrew Regalmuto?

A. Correct.

Q. Okay. The trial was held in this division of the courthouse?

A. It was.

Q. What was the outcome of that trial?

A. Mr. Rantz was found guilty I think of all counts except for he had been charged with kidnapping. And that count we had – the Judge had granted a motion for judgment of acquittal at mid-trial.

Q. Do you remember when Mr. Rantz was sentenced to in this

* * *

[149] requested that the Court initiate a Department of Human Services investigation of Phyllis Regalmuto?

A. If I have – I don't have specific recollection other than the generalities of the motion, but if you are reading from the motion, I will take your word for it.

Q. That's fine. You did file a response to this?

A. We did.

Q. You filed a motion to strike?

A. Correct.

Q. And you filed it with this court?

A. That's correct.

Q. Your response stated your motion to strike stated that neither defense counsel has never spoken to Anthony Regalmuto prior to the preliminary hearing?

A. Correct.

Q. It also stated that the only information that you had came from Anthony Regalmuto at the preliminary hearing?

A. That's correct.

Q. You made these statements to the Court?

A. That's correct.

Q. As a officer of the court?

A. That's correct.

Q. There was a hearing on this motion?

A. That there was.

Q. Do you remember how many witnesses there were at this [150] hearing?

A. Nope.

Q. Do you remember if you testified?

A. Nope. I have no idea. The no is I don't know whether I testified. I'm not saying – I want the record to be clear.

Q. No, I understand. Did you at any point make statements to the Court that you had had no contact with Anthony Regalmuto prior to the preliminary hearing?

A. I know I told the Court that I had not had any contact with Anthony Regalmuto about or interviewed him or in response to what the DA was alleging in their motion, I said I had no contact with him, that's correct.

Q. Was that statement made with the intent of telling the Court or representing to the Court that you had had no contact with everybody – with Anthony Regalmuto?

A. The statement was made in the context of the pleading. Context of the pleading was that we had that we had been in some sort of cahoots with your client and secreting away Mr. Regalmuto to California that had been part and parcel of a crime. That I knew where he was, that we were – I knew where he was residing, that we were keeping that from the police, after I had spoke to Payton Patterson in April of 2001. And that we had – we had somehow had illicit in appropriate illegal contact with him in the context of the prosecutor's pleadings. We had not.

Q. On April – on April 25, 2002. There was a motion [151] hearing in this division, do you remember.

A. I can't tell you the date but if you say there was, I will take your word for it. There was many many many motions hearing in this case?

Q. I understand. Judge Cisneros was the Judge?

A. She was.

Q. Amy Mullaney and Geoffrey Heim were the Prosecutors?

A. Correct.

Q. And you and Mr. Levinson were the defense team?

A. That's correct.

Q. And at this time on page 219 of the transcript, you stated – I'm sorry Judge, is the – I'm sorry "is the one that told me today that Tony reported that he was being sexually abused by his mom. I only have known what the Prosecution has told me. That's all I know. I will remind the Court that I have never spoken to Tony Regalmuto. I don't have the slightest idea what Tony Regalmuto has said to Prosecutors. Everything I know is from them."

A. That's correct.

Q. On April 30, 2002, under the same conditions in the motions hearing at page 134, you state, "I would also – I'm asking to strike any reference – I mean you have settled the issue about whether I had contact with Tony Regalmuto while he was in California. If I haven't, I guess we better reraise it and get it done but I all – but although I know I don't have to do this, [152] I'm referring as an officer of the Court that I did not?

A. I d[illegible]nd that's correct.

Q. You state on the record today you have never talked to Tony Regalmuto while he was in the state of California?

A. That is correct.

Q. And did Tony Regalmuto not contact you to discuss the possibility of emancipation while he was in Colorado?

A. He did not. Lisa Rantz, Geoff's sister did.

MR. GASPER: If I could have a second, Judge.

THE COURT: Yes.

BY M. GASPER:

Q. You – let's turn to the trial just a second. You intended to call Anthony Regalmuto as a witness at trial?

A. Yes, at the beginning of trial, yes, I did.

Q. And Geoff Rantz, knew you were going to call him, Tony Regalmuto?

A. Yes.

Q. And that would have been consistent with the opening statement where there were so many reference to Tony Regalmuto –

A. Correct.

Q. – testifying. On the morning of the last day of trial did you have an opportunity to meet with Tony Regalmuto?

A. I meet [sic] with Tony Regalmuto prior to trial with my investigator Will Drexler. We interviewed him. I don't have a specific recollection of meeting with Tony that morning because I

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[158] visit Mr. Rantz before sentencing at the jail. I honestly don't know whether I did or I didn't.

MR. GASPER: That's all I have right now, Your. Honor.

THE COURT: Thank you. Why don't we go ahead and break for lunch. How much longer do you think your cross-examination – go ahead. Are you okay, Kimberly? Go ahead.

CROSS-EXAMINATION

BY MS. MULLANEY:

Q. Ms. Kaufman, I want to kind of break it up just a little bit. Counsel gave you some statements that you had made either in written documents provided to the Court or in open court, and you repeatedly said, well, I mean in the context when these statements were made, they were true?

A. Correct.

Q. Is that – did I understand that correctly?

A. Correct.

Q. Could you describe for the Court what contact you did have with Tony and why you made the statements that you did?

A. Right in reviewing my time records to get ready for, you know, to look once we got the lawsuit I had had, you know, very close in time to when Mr. Rantz initially retained me which was months, months, nine months in advance of him being arrested or charged. Months before I know he was going to be charged but Mr. Rantz came and contacted me and retained me. And at this point in time where we thought he was trying to get him [159] guardianship or adopt Tony. That the first initial weird thing that happened in the parking lot where Phyllis had called Social Services and Geoff had called Social Services. And you know, Geoff had recounted the basics of that story to us. And he wanted Tony back. Tony had been living with him since he was a young kid. Tony considered Geoff, according to Geoff, to be his father.

He hadn't had any real relationship with his mom or his biological father. And according to Geoff, he was ordered not to have any contact with Tony and Tony was very upset. I had told Geoff from the beginning I didn't want him to violate any court orders because I felt that it would be important if he was going to get custody of Tony ultimately or get to get Tony back into the house that he had to strictly follow whatever the DHS and court orders were. And Geoff when he would come and see me, which was very frequently at the beginning, said Tony would repeatedly contact him and won't stop contacting him. And that Tony was very upset and didn't understand why Geoff couldn't continue to have contact with him. I said, "Well, tell him to call me and I will explain to him why you're not having contact with him. And I will explain to him why you shouldn't have contact with him right now. And that's in the best interest of to try to get Tony back together with you as quickly as possible because – "

Q. Then this was before Rantz was even charged?

A. It was. It was before charges were even contemplated. There was not any – there was nothing going on at this time which [160] would have even led us to believe there was going to be charges contemplated.

Q. So fair to say you thought you were assisting your client, Geoff Rantz, in either emancipation or an adoption of a child?

A. Something regarding Tony and making sure that he didn't compromise his job which I knew as a Department of Human Services worker could be in jeopardy if he didn't follow court orders. You know, it was all within that context. And Tony called me on a phone I think from school and I couldn't have – it was a very short conversation in which I told him he couldn't talk to Geoff, this was why, that we were going to work as hard we could get to get him back in the house with Geoff as quickly as possible.

Q. Ms. Kaufman, when we filed the motion to disqualify you then it would have been January of 2002, what was your understanding of the contact we were saying you had?

A. I think what you were saying I had that, a, I had interviewed and was in constant communication that I knew where Tony was. I did not. B, that I had interviewed him around the substance of the allegations. And C, potentially I had had something to do with him getting or knew about a crime that may have occurred in getting him from Colorado to California which I did not. And that I interviewed, him in some round about way the contact of Geoffrey's criminal charges which we never had.

Q. You had no contact with Tony from the time you had the [161] one brief conversation before charges were even filed and until continuing up until the preliminary hearing?

A. That is correct.

Q. So the statements you were making to the Court and, on the record were factually correct?

A. Absolutely.

Q. Did you intent [sic] to mislead the Court?

A. Not in any way.

Q. Let's talk about the contact you had in reference to Carrie Clein?

A. I need to say one more thing about that. I don't know that I even had a recollection of about that phone call. I didn't recall that initial phone call, no, ma'am. I went back and looked, you know, at the time sheets back in from February and tried to remember, well, why would we have talked to Tony, you know, the first week of Geoff's representation and then earlier, you know, there was this whole thing going on about Tony trying to contact Geoff and me telling Tony to stop.

Q. Okay. So you're not sure you even recalled it or remember it?

A. I doubt – I – I don't think I even – until in the last three months, you know, when I have looked at my time sheets, you know, I didn't know, you know, look – have a chance to look at my time sheets or even get them because that's were at two different firms until we started getting pleadings in the 35(c) [162] and in the civil case.

Q. So did you have any contact with Tony individually while he was in California?

A. Absolutely, no.

Q. You testified that you had contact with Lisa Rantz?

A. Correct. On dozen and dozen and dozens times.

Q. How was that then that Tony came to call Carrie Clein when I understand?

A. I don't know. I can only tell you that Lisa Rantz contacted me that said to me, "Tony wanted to be emancipated." I said I could not advise her on that. I also advised her that she ought not to be having contact with him, that she was subject to criminal liability. I advised her to get a lawyer if she had in California, because I felt strongly that if he was there, and I, you know, that they were in serious trouble and that she needed legal advice. And I believe she did get a lawyer. I gave her the name – name or names of lawyers that I knew that did – where, you know, hard fighting juvenile advocate kind of lawyer. And said, you know, these are the lawyers you ought to contact on behalf of Tony who could work on getting him back here and emancipation or DRS investigation. And so that's, you know, that was the contact and how then what happened after that, you know other than what Carrie Clein told me, I don't know.

Q. So Ms. Kaufman, at the time you did the trial, did you believe you were operating under a conflict that you had

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